Aspects of building contracts : a comparative view of English and French law in the light of potential harmonisation.

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ASPECTS OF BUILDING CONTRACTS :

a Comparative view of English and French law in the light of potential harmonisation.

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Abstract of Thesis

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Title: Aspects of Building Contracts - a comparative view of English and French law in the light of potential harmonisation.

The approach to and mechanisms of building contracts in England and France are securely entwined in their respective systems of law and histories, but merely acknowledging separate existence is no longer acceptable. The traditional imposition of national law is surrendering to uniform rules for the furtherance of trade and in the interests of competition, and construction cannot remain immune.

The protective wall of national legal systems was distinctly exposed by proposals for a community strategy for the construction industries in the EC, and confluence will be the future. How it will be shaped will depend on the reactions to each other of the heritages of the common law and civil law systems, but contribution is due from both.

Part I investigates comparative influences and approaches that lie behind some of the main features of building contracts, to see under what principles they operate, where their ends are similar, and what represents the perceived great divide.

Part II looks at areas where particular legislation has been introduced to overcome problems, and at the influence of fault and the experience with tort.

Part III in conclusion examines approaches to harmonisation and identifies principles behind some aspects that are being considered in the European Commission. Future direction in England may involve proposals to renounce the third party rule in common law. These are viewed in the context of construction. There is also the question of the potential impact of competition law on standard forms. In England their adoption will, practically, represent the law of building contracts to the parties, whereas in France the overriding effects of the Code Civil are felt in and alongside standard form. The potential for a European standard form is recognised, although the way forward to harmonisation will depend on what are seen to be the appropriate goals.

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Preface

Before the last two decades the law relating to building and construction was regarded by many as an unspectacular area, devoted to detail of little interest beyond that of the disputing parties, and hardly a subject for academic study. That has changed. In England, building cases were at the forefront of the common law growth in the law of tort in the seventies, and in its retreat.

This change has accompanied and derived from a recognition of the impact of construction in society. The recognition has also taken place at European Community level and has led to calls for a community strategy for the construction industries with the aim of harmonisation. What that means in practical terms is still being worked out, but the nature of the debate has prompted the investigation in this thesis.

To debate in the wider Community ring the respective mechanisms of nations in isolation of an appreciation of fundamental concepts of the legal systems that utilise those mechanisms is unsatisfactory, and will give rise to misunderstanding. A true comparative view is desirable for the achievement of successful solutions. This thesis seeks to appreciate and uncover the influences and principles that lie behind the mechanisms.

There is an undoubted fear in England that the common law and English ways will be submerged in a civil law based Europe. It is not forgotten that achievement in exporting the Code Napoléon has been by force of arms, altough common law system has been implanted through colonisation. Undoubtedly the great legal systems of the common law and civil law have developed separately, and their influences have reflected the colonial power of England and France and their development of commerce with countries in which their respective interests lay. In this sense the legal systems have been adversaries.

Now, with Europe under one body politic, and with a confluence of trading nations, whose expansionist policies have carried their respective legal approaches with their commercial dealings, there is no longer scope simply

for acknowleged separate existence. Confluence and harmonisation involve choice, and whereas choice under conflicts of laws rules results in the application of a single national law, the confluence of harmonisation creates the prospect of a derivative from both common law and civil law, rather than that one or other should reign supreme.

If the strategy for harmonisation is to do more than produce a regulation and leave its application to the diversities of the recipient legal systems then to reach beyond the divide it is principles that must be identified and applied. The common law requires cases and reasoned decisions for the evolution and development of principles, where civil law has the results of reasoned identification of principles encapsulated and codified, with decisions as applications of them, and whilst the methods of operation of the legal system must be comprehended, common ground can be sought beyond them.

Language and intellectual approach in methods of reasoning are two areas which lead to misunderstanding, and in seeking to overcome this in a view of aspects of fundamental concepts in building contracts it has become apparent that there is a large measure of similarity in the aim of respective principles under common law and civil law. The influence of standard forms in the construction field means that reference to them is inevitable. Equally there is danger in too great an emphasis on the detail of such forms. The latter may obscure principle, but, taken as representing norms in the process of a construction projec,t standard form provisions provide useful insights for examination, whether by application of or departure from principles. Standard forms also provide a perspective of different approaches in practice.

This is not a subject where investigation has led to a q. e. d. answer to questions, such as whether the English peculiarity of the quasi-arbitral role of the architect/engineer should prevail, or, whether there is an insuperable gulf between the ending of the contractor's performance obligations and the start of his guarantee obligation at réception under French law and the action for damages under common law when coupled with the effects of substantial completion in respect of liability for payment. The result has been to benefit

from a comparative examination.

The consequence suggests that a protective attitude to the national system is not justified and that mutual benefit will derive from greater understanding of the systems of others; that there is a prospect for harmonisation to increased economic and competitive ends; that the process gains from study beyond the terms of competing standard terms which may represent no more than the lowest common denominator of sectional interests rather than the presentation of principle; and, that legislation can introduce successful regimes, overcoming the complexities of contract terms and giving protection where thought fit.

However, nothing achieved is immutable, and in that sense there is no end save to advance in trying to understand. It is hoped that this thesis achieves that end.

[1] NATURE AND ORIGINS

1 Historical and Practical Background

In October 1988 the European Parliament adopted a resolution that there should be a Community strategy for the construction industry to provide for a more unified market, whilst allowing for local peculiarities. The promotion of free trade in a single market is an overriding aim, but, within that, harmonisation of control, contracts, liability and insurance have been under consideration.[1] The apparent difficulties of comprehension facing European neighbours in viewing the mechanisms in England relating to building contracts are no less than for the English in viewing the civil law system. This study sets out to explore aspects of building contracts in England and France, to examine approaches, features and their backgrounds in an attempt to appreciate and understand them in the light of potential harmonisation.

In England there has been no special place for the building contract within which its development has taken place,[2] and the functional definition of "any contract where one person agrees for valuable consideration to carry out building or engineering works for another"[3] indicates the basis of the

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1 Commission of the European Communities. C. Mathurin: Controls, Contracts, Liability and Insurance in the Construction Industry in the European Community, "Study of Responsibilities, guarantees and insurance in the construction industry with a view to harmonisation at Community level", February 1990.

2 When seen against sale of goods for example.

3 Keating on Building Contracts, 5th Edition.

application of established principles of law.[4] This is not saying that statute does not impinge on the building contract, nor that the field does not warrant specialist treatment. To the contrary, there are features that have led to the distinctive study of building contracts in order to appreciate the regime. Particular features are the use of standard forms, the role of the engineer or architect, the multiplicity of sub-contractors, the assumption of design responsibility, the time span involved in works and in the manifestation of defects, and the carrying out of works on land of another.

The civil law classification of contracts extended in France to the *contrat de louage d'ouvrage et d'industrie*,[5] the contract of hire of work and skill, so that the development of law relating to building contracts evolved from a source of an identifiable relationship and responsibility. To a European mind this creates a "rational logic"[6] against which the common law of England "gives a contrasting general impression which can be summed up in two words: pragmatism and uncertainty"[7] and where under its legal basis "standard contracts have acquired a legal value which goes beyond the particular scope of each contract."[8]

From this perception iewand with uncomfortable deductions from the minutiae of certain forms of contract it is apparent that the identification of principles against which harmonisation may be viewed is desirable. It is the lack of a perceived overriding regime in England that presents the challenge

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4 "When parties enter into a detailed building contract there are ... no overriding rules or principles covering their contractual relationship beyond those which generally apply to the construction of contracts", Lord Morris of Borth-y-Gest in Gilbert-Ash (Northern) Ltd. v Modern Engineering (Bristol) Ltd. (1974) A.C. 689.

5 Equally and sometimes preferred, the *contrat d'entreprise*.

6 The Mathurin Report identified this: "In the Latin countries the laws in force are included in Civil Codes, which have developed from the Code of Justice of ancient Rome, and subsequently the Code Napoleon, promulgated in 1804. In Anglo-Saxon countries the legal system is a system of customary law. In the former, cases are judged through interpretation of the Code, in accordance with rational logic."

7 The Mathurin Report introduced the U.K. system as one: "Based on standard contracts, decisions of the high court, parliamentary laws and government orders, this system is truly unique within the European Community. It gives a contrasting general impression which can be summed up in two words: pragmatism and uncertainty. Pragmatism because contract is of primary importance, because government clients are not governed by special rules, because the protection of house-buyers is a success. Uncertainty because unwritten law is difficult to apprehend, because some traditions are challenged, because diversity sometimes leads to confusion."

8 The Mathurin Report presents the "Legal basis" as: "Like the constitution of the United Kingdom, the Common Law is not written down; it consists of significant decisions by the judiciary, and it can never be amended by contract. Standard contracts have acquired a legal value which goes beyond the particular scope of each contract. This characteristic of the British system is explained not only by tradition but also by the lack of legislation on government contracts and by the lack of government jurisdiction."

in a comparative study to examine whether a basis does exist for sharing a perception of future direction.

The work and labour element

The origins of building contract law are in the rules developed from contracts for work and labour in their barest form, albeit that current sources of applicable rules are contained in a multitude of contract forms and voluminous general conditions that provide a detail far greater than any private law codification. A comparison between aspects of English and civil law, particularly in France, may briefly consider work done on materials as distinct from sale.[9] Work on materials covers their manufacture and their supply;[10] and the point where the labour element is regarded as an essential part of the transaction, and its provision, has been the key element for distinguishing a contract for work and labour from a contract for sale.

In nineteenth century England it was relevant whether the work and labour resulted in something "that can become the subject of a sale".[11] The need for classification continued after the Sale of Goods Act 1893, but the distinction expressed derived from the substance of the contract as to the skill and labour exercised.[12] It was not dependent on the comparative value of work and labour against the materials, for where the purpose of the transaction is the

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[9] F. Nicklisch: Sales Contracts against Construction Contracts. (1988) I.B.L. 16, 253.

[10] Work on goods formed a basis for the comparison by Professor W. Lorenz in Volume VIII, of the International Encyclopaedia of Comparative Law,, chapter 8, Contracts for Work on Goods and Building Contracts. A commentary on this work is in I.N. Duncan Wallace, Construction Contracts: Principles and Policies in Tort and Contract.

[11] Lee v Griffin (1861) 1 B. & S. 272. The decision of Blackburn, J. in the case was that the agreement by the dentist to make a denture for one of his patients was a sale of a chattel rather than a contract for work and labour. The notion that the relationship between the value of the work and the value of the materials used had any significance was rejected, with the example of a sculptor employed to execute a work of art: "... greatly as his skill and labour, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would ... nevertheless be a contract for the sale of a chattel".

[12] Robinson v Graves (1935) 1 K.B. 579 (C.A.). An artist orally commissioned to paint a portrait for payment of a sum would by the Sale of Goods Act 1893 have had no enforceable contract for lack of the formal requirements. The Court of Appeal held that the contract was for work and labour and not for the sale of goods on the basis that the substance of the contract was that skill and labour should be exercised upon the production of the portrait, and it was only ancillary to that contract that paint and canvas would pass from artist to customer. By section 4 of the 1893 Act contracts for sale of goods of the value of £10 and above were not enforceable by action unless the buyer had accepted and received part, or given something in earnest to bind the contract, made part payment, or unless some note or memorandum in writing had been made and signed by the party to be charged.

supply of a complete article its nature was the determining feature. [13]

The implication of warranties in contracts for work and labour are equivalent to those implied by the Sale of Goods Acts,[14] and there is no practical necessity to invoke the different classification.[15] There is no logical distinction between obligations which ought in general to be implied with regard to quality and fitness between a sale of goods and a contract for work and materials,[16] although it has been suggested that the obligation under the latter might be greater.[17]

The paramount nature of the work element itself which differentiates a building contract from a sale, is likely to be the subject of separate reliance. The attached obligation of care and skill is within the trilogy of warranties normally applicable to a building contract:

> "... when a purchaser buys a house from a builder who contracts to build it, there is a threefold implication: that the builder will do his work in a good and workmanlike manner; that he will supply good and proper materials; and that it will be reasonably fit for human

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[13] So, for a plaintiff who agreed to build a steam engine which had to be completed and installed for the price, the proper nature of the claim was either for the work, labour, and materials or, straightforwardly, for erecting and constructing an engine; Clark v Bulmer (1843) 11 M. & W. 243, per Parke B..

[14] G. H. Myers & Co. v Brent Cross Service Co. (1934) 1 K.B. 46, per du Parq J at 55: "... the true view is that a person contracting to do work and supply materials warrants that the materials which he uses will be of good quality and reasonably fit for the purpose for which he is using them, unless the circumstances of the contract are such as to exclude any such warranty." This was a repair case where one of the new parts proved to have a latent defect.

[15] A condition of reasonable fitness for the purpose in a contract for dentures was implied without finding it necessary to decide the precise nature of the contract, Samuels v Davis (1943) K.B. 526 (C.A.); "In my view, it is a matter of legal indifference whether the contract was one of or the sale of goods or one of service to do work and supply materials", per Scott L.J. at page 527.

[16] This point was made in Young & Marten Ltd v McManus Childs Ltd. (1969) 1 A.C. 454 (H.L.) in deciding that a contractor when supplying and fixing specified tiles for roofing in the course of the construction of houses impliedly warrants that the tiles are of merchantable quality: "The distinction between a contract for the sale of goods and a contract for the provision of work and materials is one which depends on the particular nature of each individual contract, as was said as long ago as 1856 ... and it is frequently a question of fine distinction. It would be a severe blow to any idea of a coherent system of common law, if the existence of an implied obligation depended upon such a distinction. That there are distinctions between the two types of contracts is undoubted; questions of pleading (in the old days), passing of property,and so on. But, of course, the real distinction upon which so many decisions were focused depended upon the fact that for 277 years until 1954 a contract for sale above a small value required evidence in writing to be enforceable, whereas a contract for work and materials did not."

[17] Lord Upjohn in Young & Marten Ltd v. McManus Childs Ltd at page 473, "Indeed, for my part I think, as a matter of common sense and justice, one who contracts to do work and supply materials ought to be under at least as high, if not a higher, degree of obligation with regard to the goods he supplies and the work that he does than a seller who may be a mere middleman or wholesaler." The reference to 1954 is to the repeal of s.4 of the Sale of Goods Act 1893 by the Law Reform (Enforcement of Contracts) Act 1954, sections 2 and 3 (2).

habitation.[18]

The distinction may be of legal indifference for the attachment of warranties, but the relationship of the supply of goods to the work element is relevant to the similarity of the terms to those arising under a contract of sale.[19] Such a result,[20] is now achieved for the supply element by the Supply of Goods and Services Act 1982.[21] Beyond this category the result is achieved as to the work to be done by Part II of the Act applying to contracts "for the supply of a service". A building contract is such a contract and there is implied under statute that the supplier will carry out the service with reasonable care and skill,[22] with the common law supplying any other necessary implication for the materials and end result.

There is a practical importance in the distinction in civil law systems,[23] particularly because of the remedies available in respect of building defects. An example is that under Italian law it is only in the case of a contract for work and labour that rectification of the defects may be demanded whereas in a contract of sale, cancellation of the contract or reduction of the price is

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[18] Hancock v B. W. Brazier (Anerley) Ltd. (1966) 2 All E.R. 901 (C.A.), approving Diplock J. at (1966) 2 All E.R. 1, and deriving from Perry v Sharon Development Co. (1937) 4 All E.R. 390 (C.A.).

[19] Young & Marten Ltd. v McManus Childs Ltd. (1969) 1 A.C. 454, per Lord Wilberforce at 477, "Authority apart, it would seem reasonable that, the larger the element of supply of particular goods in the contract, the closer should be the similarity of warranties to be implied with those arising on a sale. In many cases there would be no logical reason for not importing a condition or warranty identical with that arising under section 14(1) of the Act (1893). On the other hand, if the acquisition of an identifiable object is of minimal, or no, interest to the "purchaser" then, if any warranty is to be implied, it should properly relate either to the quality of the work to be done or to the use of suitable, and non-injurious, materials."

[20] Lord Wilberforce in Young & Marten Ltd. v McManus Childs Ltd. (1969) 1 A.C. 454 at 477; "I do not think that much citation of authority is required to show that, in fact, the law has developed just in this way. Before the Sale of Goods Act, 1893, the courts had to consider questions of implied warranty under the common law and they did so, both in relation to sales, proprio sensu, and to analogous contracts, not strictly or at least not purely sales, in precisely the same way. Their conclusions as to sales were taken into the Act, but the pre-existing principles remained and continued to be applied."

[21] Applicable as it is to a "contract for the transfer of goods", where one agrees to transfer to another property in goods immediately or in the future but not being a contract of sale.Part I came into force on 4 January 1983.From section 4, the fact that services are also provided does not affect the impact of the legislation which includes the importation of the like terms as to quality and fitness as on a sale.

[22] Section 13. Part II of the Act came into force on 4th July 1983.

[23] Whilst in England special remedies are available under contracts for sale in respect of the goods themselves these are analogous to a form of security for payment On the Seller's part: a lien on the goods for the price while the seller is in possession of them, section 41(1); a right of stopping the goods transit after parting with possession in the case of insolvency, section 44; a right of re-sale, section 48; on the buyer's part a right to reject, section 30. These arise by implication of law and can be excluded or varied by express agreement; Sale of Goods Act 1979, section 39(1).

normally the only remedy open to the buyer.[24] For the purposes of the distinction, where materials supplied are merely instrumental and accessory, *meramente strumentale ed accessoria* , when compared with the skill and labour to be engaged in the production of the article, the Italian courts, it seems, tend to assume there to be a contract for work and labour, *appalto* , rather than a sale, *vendita* . Both objective and subjective criteria are applied and the fact that the value of materials supplied and used exceeds the value of the work done will not, taken alone, be decisive. The common intention of the parties is also important in deciding whether the obligation is one to do something , *fare* , or to give something, *dare* .[25]

In France the classification lies ordinarily in favour of a contract of sale, *simple vente à livrer* , whenever the supply of materials dominates, as compared with the work to be done, and in favour of a contract for work and labour when the converse applies.[26] Such considerations apply to work on movables, but there is a different view if the obligation concerns the delivery of movables to be incorporated into immovables when the sales element becomes absorbed by the *marche d'entreprise* .[27]

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[24] The Italian Codice Civile Article 1662 gives the right to demand that the contractor conforms with the conditions of the contract and after the expiry of a period of time fixed for this purpose the contract is terminated upon failure. Article 1662: "... When in the course of the work, it is ascertained that performance is not proceeding in accordance with the conditions established by the contract and according to the standards of the trade, the customer can establish a suitable time limit within which the contractor must conform to such conditions. If such time limit expires without results, the contract is terminated without prejudice to the right of the customer to be compensated for damages." Trans. Beltramo, Longo & Merryman.

[25] Cass. 8th October 1973, no. 2528, Mass. Giust. civ. 1973, 1330.

[26] A practical consequence of such characterisation under French law is that the provisions of Article 1641 governing the seller's warranty against hidden defects apply to sales, whereas the scheme of guarantee obligations under Article 1792 applies to those taking on work in connection with a building contract.,

[27] Under German law legislation expressly covers borderline cases on the line between sales law and the law relating to work and labour, for the BGB ¶¶ 651 covers a situation where a workman supplies the materials from which the work is to be made (contract for the delivery of work - Werklieferungsvertrag) and it is treated as if it were a contract of sale except in those cases where the product cannot be replaced by a simple purchase of another (nicht vertretbare Sache) in which case ¶¶ 651 provides a number of applicable rules. In this way the warranty against defects of quality under sales law is effectively replaced by specialised rules prevailing in the area of contracts for work and labour. Burgerliches Gesetzbuch (BGB): ¶¶ 651. (Contract for delivery of work). (1) If the contractor binds himself to produce the work from material provided by him, he shall deliver the thing produced to the customer and convey ownership in the thing. The provisions applicable to sale apply to such a contract; if a non-fungible thing is to be produced, the provisions relating to a contract for work, with the exception of ¶¶ 647, 648 take the place of ¶¶ 433, 336 (1)-1, and of ¶¶ 447, 460, 462 to 464, 477 to 479. (2) If the contractor binds himself only to provide additions or other accessories, the provisions relating to a contract for work apply exclusively. Trans. Forrester, Goren, ligen. North Holland Publishing Co.

The roots of the civil law systems for work on goods and building contracts, whilst material to the distinction between such contracts and contracts of sale, more importantly assist in an understanding of principles unfamiliar to the common lawyer which will inevitably lie behind regulation or harmonisation,[29] and which might otherwise remain hidden by points of practice or the wording of standard forms of contract. Bare rules may mislead when looking for functional equivalents,[30] just as distinctive modes of thinking in the legal families may affect the identification of principles. The approach of the English common lawyer will require adaptation in order to participate properly in the debate with those from the Germanic and Romantic families with their well articulated systems. To develop a new approach it is necessary to examine the solutions their rules provide.

To this end some aspects of Roman law that have influenced principles of civil law applicable in the building field are material, but one must beware that common lawyers when viewing civil law frequently fall into the trap of regarding it as no more than modernised Roman law, and so emphasise resemblance between various civil law systems leaving out of account particular facets of a nation's approach.[31]

A view of Roman Law

The contract *locatio conductio* was a letting and hiring; where someone agreed to give to another the use, or use and enjoyment, of a thing or his services or his labour in return for remuneration.[32] Although in terms of rules closely resembling a contract of sale it was legally distinct and referable to a hiring. Like a contract of sale it was completed by the agreement of the

[28] The body of Roman Law is from the Digest, including the Institutes of Gaius and Justinian. References where specified are to Mommsem's edition of the Digest in "Corpus Iuris Civilis" (1880) with references identifying the relevant articles of the Digest and the Institutes of Justinian.

[29] Commission of the European Community: C. Mathurin, "Study of Responsibilities, guarantees and insurance in the construction industry with a view to harmonisation at Community level", 2nd February 1990.

[30] Zweigert and Kötz: An Introduction to Comparative Law, Part. 1.

[31] F.H.Lawson, The Approach to French Law. (1959) 34 Indiana L.J. 531, where, subject to the warning, it is suggested that it is wise for a student of French law to start with a brief study of Roman law.

[32] F.H.Lawson, The Approach to French Law. (1958-9) 34 Indiana L.J. 531,

parties and fixing of the price, and it produced only personal obligations not real rights.[33]

The *locatio conductio* took on three forms: the hire of a thing, *locatio conductio rei* ; the hire of services, *locatio conductio operarum* ; and the hire of a piece of work, *locatio conductio operis* .[34] Different meanings became attached to the word *locare* and its derivations such that in the first two cases someone supplying the thing or the services was the *locator* and the person who paid was the *conductor* . Conversely in the third case, the *locatio conductio operis* , the person giving the order was the *locatur* (he 'places' the order), and the person executing the work or provides for its execution the *conductor* .[35]

Whilst the concept of labour producing or creating a piece of work originated in the category of hiring, the distinction shown by the different meanings that became attached to the same words indicates that under Roman law the third form, the contract for work or building contract, outgrew its origins and terminology.[36] It is understandable that the *locatio conductio operis* did this when there was a need to cater for the placing of an order.[37] Paulus considered that this was a contract of hire,[38] but Sabinus provided a different reason; that the principal thing comes from 'me' namely that the building accedes to 'my' soil,[39] being a central feature of building operations and impacting on rules governing them.

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[33] "The contract of letting and hiring approaches very nearly to that of sale and is governed by the same rules of law. As the contract of sale is formed as soon as a price is fixed, so a contract of letting and hire is formed as soon as the amount to be paid for the hiring has been agreed on; and the letter has an action *locati*, and the hirer an action *conducti* ." Institutes Book 3 - 24 from Digest 19.2.2, and Proemium, Translation: T. C. Sandars, The Institutes of Justinian.

[34] Pernice suggests that in contracts "opera" was the technical expression for the work of the contractor. (Digest 19-2.2, and 15pr. "Si aurum dedero mercede pro opera constituta").

[35] This was because the Roman jurists generally looked at the work itself that was to be done, and spoke of the person who contracted for its performance who "gave it out", as the *locator* , and the person who engaged to perform or execute it, or "took it in", as the *conductor*.

[36] This would have followed from limitations on the contract of hire where in early forms there was always something "placed": I place a thing at your disposal; I place myself at your disposal; I place in your hands something on which you are to expend your labour, for example, material to construct a house.

[37] For example, to construct a building.

[38] Digests. 19 - 2.22 (2).

[39] This reason may have derived from the Sabinian school for, despite difficulties of application and some inconsistencies, the point of acceding to the soil was a reflection of the law relating to acquisition by occupation and other methods, for instance a person who used materials might either give them new form or make something from them, different from the materials themselves, a *nova species*, so that a person who made wine with another's grapes was considered the owner, Digests. 18 - 1.20..

Locatio Conductio Rei , and Operarum

The duty of someone hiring out a thing , *locator rei*, was to procure to the hirer its use and enjoyment for the purpose contemplated by the contract during the period agreed. The duty ceased upon prevention by impossibility arising from no fault of his own, in which case he could not demand the hire money.[40] There was also a duty to keep the thing hired in repair and a duty to compensate the hirer for necessary and useful expenses.[41]

The first obligation of the *locator* in this case, was to deliver the thing free from defects so as to be fit for its purpose, for example the supply of wine vats that leak was not the supply to which the hirer was entitled; and there was liability based on the status of the contract, and not on fault.[42] So that when considering the *locatio conductio operis* , and appreciating the mutation of meaning , the contractor, *conductor* , was similarly liable without question of fault.[43] Just as the *conductor* , hirer , was at risk as to the fee in a hiring of services when an extrinsic cause intervened to prevent the *locator* providing his service, it became equally so in the *locatio conductio operis* . The work was at the risk of the *conductor*, contractor, so that if it was destroyed whilst in the contractor's hands, the price was not due, but if the work was destroyed due to defects in the material supplied by the *locator* , employer, then there was no such liability on the contractor without fault on his part.[44]

The standard of care required of the *conductor* was "as great care for the safe custody of the thing he hires, as the most careful father of a family bestows on the custody of his own property", although "if he bestows such care, but loses

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[40] The *merces;* Digests 19 - 2.9.3-4.

[41] Digests 19 - 2.55, 1. Necessary expenses were such as were required to preserve the property from destruction or depreciation. Useful expenses increased the value of the property, though their omission did not render it less valuable. There was an exception in that the hirer was responsible for trifling repairs.

[42] That status was *ex locato*.

[43] Digests 13. 1 to 6. An example was when a fuller loses cloth given to him to clean, or allows mice to gnaw it.

[44] This found its way into the French Code civil. Planiol: Traite élémentaire de Droit Civil (1939) on the Code Civil. Article 1790. "The workman who has received the material of a thing to be made, for which he has furnished only his labour, has no right to any wages, when the object made perishes before having been delivered, unless such loss was due to a vice in the material."

the thing through some accident, he is not bound to restore it."[45] The risk was on the contractor, so also the burden of showing the defect in the material.

The hiring of services, *locatio conductio operarum* , gave rise to the obligation on the hirer or receiver of the services, the *conductio* here, to pay the wages or price for the full period agreed if the person hired was ready to render the services, and whether such services were used by the hirer or not.[46] Prevention from doing the work by some cause extrinsic to the workman hired did not disentitle him from his wages where he had not obtained other work, but failure to deliver the services did disentitle him. Additionally, the person hiring himself out had to be competent for the work he undertook[47] and negligence or fault made him liable for the consequences.[48]

The remuneration had to consist of money. It had to be certain or ascertainable. Provision for the fixing of the remuneration by a third person came within these requirements so as to constitute it a contract of hire, provided the third person actually fixed the amount.[49]

Locatio Conductio Operis

The *locatio conductio operis* contemplated an engagement for a particular piece of work involving a physical subject matter. There was the familiar difficulty over the dividing line from sale contracts:[50] where a goldsmith was to make rings, himself supplying the material it was ultimately decided that

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45 "*Qualem diligentissimus paterfamilias suis rebus adhibet*", Institutes 3-24.5, Trans. Sandars.

46 Digests 19 - 2 14.9. Digests 2.25. The price of or consideration for the letting was again the *merces*.

47 Digests 19-2.9.5.

48 Digests 19-2.19.9 to 38.

49 If the amount was not fixed, so as to constitute a contract of hire, compensation for services rendered could be claimed by *actio praescriptis verbis*. The Institutes record: "What we have said above of a sale in which the price is to be fixed by the decision of a third person, may be applied to the contract of letting and hire, if the amount to be paid for the hire is left to the decision of a third person. Accordingly, if any one gives clothes to a fuller to be cleaned, or to a tailor to be mended, without fixing the sum to be paid for their work, a contract of letting and hire cannot properly be said to be made; but the circumstances furnish ground for an *action praescriptis verbis* "; Institutes 3-24.1, from Gaius 3-143, Digests 14-2.25.

50 Lee v Griffin, and Robinson v Graves op. cit..

this was sale, not hire.[51]

Someone contracting to build with his materials on another's land was *conductor operis* ,[52] whether because as the land was part of the finished product he was only providing an element, or, because the result of the work merged in the land and had no separate existence.[53]

The *locatio conductio operis* might be made for the whole job at a sum absolutely fixed, as distinct from so much *per diem* , or so much for each portion completed. The *conductor operis* had to execute and deliver the work according to the specifications, and was answerable for all defects, whether due to his own want of skill or that of his workmen and subordinates.[54] Acceptance or approval of the work by the *locator* had the important effect of extinguishing this liability except where there had been *dolus* , wilful injury, on the part of the *conductor* .

For the *locatio conductio operis* the same rules as to remuneration as in the *locatio conductio rei* applied, and the price fixed might be a lump sum, or so much for each part of the work. The latter did not prevent an employer's claim for bad work at completion of the whole, unless it was arranged that the work should be approved, and so accepted, at each stage.[55] The *locator* had to pay the sum agreed provided the work was satisfactorily executed, but was permitted to withdraw from the contract if the ultimate cost exceeded the estimate given by the *conductor* .[56]

This is the root of the approach of civil law systems to the important feature of acceptance of work.[57] It was critical to risk and its transfer. When the work

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[51] Nor as Cassius had determined, sale of the materials and hire of the goldsmith's labour. Gaius 3 - 147; Institutes 3 - 24.4: "It is also questioned whether, when Titius has agreed with a goldsmith to make him rings of a certain weight and pattern, out of gold belonging to the goldsmith himself, the goldsmith to receive, for example, ten aurei, whether the contract is one of sale or *locatio et conductio* . Cassius says that there is a sale of the material, and a letting and hire of the goldsmith's work; but it has been decided that there is only a contract of sale. If Titius gives the gold, and a sum is agreed on to be paid for the work, there is no doubt that the contract is then one of *locatio et conductio.* ." Trans. Sandars.

[52] Digests 19 - 2.22. 2.

[53] Buckland, A Textbook of Roman Law, 3rd Edition. This was the thinking of Sabinus.

[54] Digests 19-2.25.7. The work was the *opus* .

[55] Digests 19-2.51.1.

[56] Digests 19-2. 60.4.

[57] *La Recéption* under French law.

was to be done subject to the *locator's* approval of the whole, it remained at the risk of the contractor until approved, and equally if the work was to be done by measure or section then the risk in respect of such remained until reached and approved. An agreement that work was to be completed so as to satisfy the *locator*, or subject to his approval, was interpreted as subject to reasonable, not arbitrary, approval.[58]

This approval could be that of a nominee of the *locator* but reasonable approval remained. The standard required was that which ought to satisfy the approver, with the judgment that of a *bonus vir*. This derived from the standard of obligation imposed on the *conductor* in relation to the contract of *locatio conductio* under which "the *conductor* ought to do everything according to the terms of his hiring, and if anything has been omitted in these terms, he ought to supply it according to the rules of equity."[59] Approval obtained by fraud was void so a claim for defects fraudulently concealed existed even after the work had been approved.[60]

The timing of approvals to which work was subject was significant as it bore on the question of risks. Approval had to be made within a reasonable time of demand,[61] and the risk was on the *locator*, with an obligation to pay the *merces* whatever happened to the work, so far as approved, or, if approval had been delayed, *mora*, such as ought to have been approved.[62] The *conductor* was entitled to payment for the work done if it was accidentally destroyed before completion, and the work was and remained at the risk of the employer in the event of destruction by *vis major*, although fault on the part of the contractor was not excused by this.[63]

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58 Digests 17-2.77.

59 " ... *id ex bono et aequo debet praetare*." Institutes 3-24.5, Digests 19-1.25.3.7, Trans: Sandars.

60 Digests 19-2.24 pr. 51.1. Whilst rational, there is some doubt as to the clarity with which this aspect was approached, per Buckland: Albertario, L'arbitrarium bonis viri del debitore, 14, does not accept the proposition as clear law.

61 Implied by Digest 19-2.36; Cato, de agr. 144 2.

62 Digests 14 2.10.

63 Digests 19-2.36, 37, 59, 62.

These facets of Roman law have been influential in the derivation of principles now applicable to construction in France, and in other European countries which received the Code Civil. Difficulties relating to construction work on land were addressed but were not separately or clearly resolved, and this may be seen as the reason why few detailed rules relating to building contracts were to be found in the codes based on Roman law.

No building can exist without ground support, which may be an unknown in construction,[64] and preliminary investigations may offer little protection against sudden surprises.[65] Roman law considered the distribution of typical spheres of ground risks in a manner that has proved influential in civil law on the responsibilities of owners and contractors as they exist today.[66] The central principle was that where there was doubt the contractor bore the ground risk until he could prove that he had fulfilled his portion of the work in accordance with the contract. [67]

Beyond this the impact of extraordinary geological forces outside that sphere of risk lay with the owner of the site, as where it was demolished by earthquake.[68] Equally where destruction of a building occurred accompanied by the owner's delay in acceptance then the risk of accidental destruction rested with him.[69] There was also conscious risk allocation in the period prior

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[64] Geological faults, erosion, unexpectedly shifting soil strata, hidden obstacles concealed old building foundations, unforeseen underground water tables, surprising deposits of bedrock and many other unforeseeable impediments make ground conditions the cardinal risk in every construction contract.

[65] So that nearly all work undertaken becomes to a certain extent a proto-type. The unseen part of a floating iceberg that lies beneath the surface is the most fitting comparison for this situation: Jacques Catz, Les Constructeurs et le Risque du Sol, Editions du Moniteur, Paris, 1985, p. 253.

[66] Professor W. Lorenz, Contracts for Work on Goods and Building Contracts, International Encyclopedia of Comparative Law. Vol. VIII, chap. 8, p. 124.

[67] "When you commit yourself to build a sewer and begin the work, and then this collapses due to a cave-in before it has been approved, then you must carry the risk ...", per Labeo, Digests, 19.2.62.

[68] "Flaccus had taken over the construction of a house for Marcius, which again collapsed following completion of a part of the house due to renewed settling of the soil; Massurius Sabinus stated in this case that when it occurs on the part of the force of nature, such as earth slide, the damage affects Flaccus (as owner)", per Javolemus, Digests 19.2.37; there was a similar statement from Paulus, Digests, 19.2.62.

[69] "When a work for performance has been given out in its entirety, the contractor carries the risk until the structure has been accepted by the owner. However, in the event of a contract for measurements at the site with uniform prices, the risk lies with the contractor only as long as no measurements have been made; and in both cases, the owner is responsible to the extent that he is responsible for non-acceptance or non-measurement", per Florentius, Digests 19.2.36.

to acceptance for " ... when the work performance is destroyed by an act of God prior to acceptance, the owner bears the risk, in so far as nothing to the contrary has been agreed upon."[70]

3 Characteristics

Development of Construction Law

A comparative view with harmonisation in mind should extend to the manner of receipt of principles of Roman law, for their application is material to an appreciation of the approach of French law, and its national characteristics. In France the revolutionary events were critically important for the Code Civil and its formulation, but there was absorption of the results of a long development of the *ancient droit* and an influence of the conceptual thinking of Pothier.[71] Whilst the Code was founded on the creed of the Enlightenment and the law of reason, that social life could be put into rational order if only the rules of law were restructured according to comprehensive plans, an influence remained from the *droit coutumier* which evolved in the century before the Revolution, and of the droit *écrit*. Historically the *droit coutumier* had been more prevalent in the north and influenced by Germanic-Frankish customary law, while the *droit écrit* as developed in southern areas bore the mark of Roman Law, although there was overlapping.[72]

The original Code Civil was the law book of the third estate, the bourgeoisie, and the model in the minds of the draftsmen was not the artisan, but the man of property, judgment and reason,[73] depending on guaranteed personal freedom to engage in economic activity free from dominance by the feudal

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[70] From Florentius, Digests 19.2.36.

[71] Zweigert & Kötz, An Introduction to Comparative Law. Pothier lived from 1699 to 1772.

[72] In the century before the revolution the *Coutume de Paris* had become generally accepted as applicable, and the influential work of Bourjon (1720) was, interestingly, called *"Le Droit commun de la France et la coutume de Paris reduit en principles."*

[73] The Commission of four appointed by Napoleon to draft the Code were experienced practitioners: Tronchet, President of the Cour de Cassation, and Bigot de Preameneu had both been advocates at the Parlement of Paris and represented the *droit coutumier* while Portalis a high administrative official, and Maleville, a judge of the Cour de Cassation, represented the *droit écrit*. Napoleon's significant contribution included achieving clarity of expression and language in relation to the realities of life and the ideas incorporated in the Code.

groups of the *ancien regime* .[74] Consistent with social aims in introducing the Code Civil, forced execution of obligations was not permissible where the contractual obligation was to 'do'; for "every obligation to do resolves itself into damages in case of non-execution".[75] Restriction on the requirement to pay damages for breach of contract depended on the ability to escape upon proof, provided for in Article 1147, that an external event, *cause étrangère qui ne peut lui être imputée* , was the reason for the non-performance; and by Article 1148 the duty to make compensation ceased in the event of *force majeure* or cas *fortuit* .

The structures for construction law in England and France reflect the fact that common law and the Code Civil provide some articles of principle, with the growth in a body of standard rules to guide the practices derived from the participants having been left to develop their own regulation for the operation of the construction process.[76] They also reflect legislative activity of a protective nature towards the ultimate consumer and those less able to influence contractual rights and obligations, but in differing degrees. The strength of the professions and associations or groups within the building and engineering industries, particularly in England, has created almost standard self-made rules, or norms.[77] Such rules may be regarded as law in the sense that the thing done becomes the done thing, and mutation occurs, for instance, by group activity depending upon economic or other strengths. In France, however, the influence of the state is substantial by the lead given in the formulation of rules governing public contracts, in addition to its willingness to legislate to the perceived benefit of sections within the industry, as in the case of the sub-contractor and retentions.

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[74] In his *Discours préliminaire* Portalis explains the thinking of the draftsmen of the Code Civil, suggesting that the French concept of the law rests on three fundamental principles: a code ought to be complete in its field; it out to be drafted in relatively general principles rather than detailed rules; and it ought at the same time to fit them together logically as a coherent whole and to be based on experience. From P. Fenet, *Recueil complet des travaux préparatoires du code civil* , 1827; and discussed by A. Tims, Methodology of the Civil Law in France. (1976) Tulane L.R., 459.

[75] Planiol, Traite Elémentaire de Droit Civil, (1939). The Code Civil did not provide regulation of the *astreinte* , the legal mechanism for enforcing judicial orders for performance, subsequently developed by the Courts, and involving a pecuniary judgment imposed as a penalty at a rate per day, which is considered under Performance and Damages.

[76] The role of the deductive methodology as the basis of French legal reasoning is important. It is seen to be obvious in the French school of legal thought that problems cannot be resolved by specific wording which foresees and provides for them in advance. The tradition is to rely on basic principle thoughtfully formulated so as to govern the wide variety of circumstance, rather than looking at individual events in order to determine into which pigeon-hole to place them.

[77] The German term is "selbstgeschaffenes Recht der Wirtschaft" - self-made law of industry.

The developed provisions of building and engineering contracts, and the length of time over which they have been implemented renders them important in understanding the construction process, and a proper source for consideration alongside legal principle. For an English lawyer there are numerous decisions on and castigations of provisions of standard forms by courts and others which have led to reconsideration and changes in subsequent editions, and parties adopt and adapt provisions of the forms for their particular perceived needs.

The development of standard provisions through economic or sectional groupings has brought in its wake legislative control impinging on freedom of contract.[78] In this sense legislative control is endorsing standard provisions provided they conform with legislative policy, and this aspect, so far as England is concerned, will have a greater impact than an approach that has previously depended on control by judicial activity with its fortuitous case by case consideration, and with limited artillery in the shape of attitudes to exemption clauses, rules of construction and implied terms. The impact of decided cases in construction law in France is it seems of increasing significance, with the use of the principle of good faith as part of a development which may be flowing conversely to the common lawyer's perception of civil law sources.[79]

Standard forms of building contract have a long history. For example, in the Netherlands the oldest form dates from 1839, one year after the introduction of the Dutch Civil Code. This contract, issued by the Ministry of Waterways, was modified and the 1938 edition, "Algemene Voorwaarden" (General Conditions), underwent major changes in 1968 to form the Uniform

[78] As in the Unfair Contract Terms Act 1977, Defective Premises Act 1972, Supply of Goods and Services Act 1982.

[79] Decisions of the *Cour de Cassation* in France in the field of construction are seen as having an increasing impact in settling, or unsettling, the application of principle. In the Netherlands the authority of the specialist court of arbitration for the construction industry is high, and its decisions are published and substantially relied on. Judgments of the Cour de Cassation are carefully worded in a concise way in order to facilitate the development of principles of more general use. It is not that judicial opinions are never published or relied upon This may run counter to Article 5 of the Code which prohibits a judge from pronouncing a judgment by way of a general ruling not exclusively related to the case. The courts are sometimes close to these limits. In the French tradition, the wording of the most significant decisions are as precedents regarded as similar to provisions of the loi, and when considering any contract, reference is first made to the Code Civil.

Administrative Conditions.[80] The reforms in the UAV Conditions were made after consultation with the building industry. Whilst drafted for government contracts their use in private contracts became widespread, albeit frequently subject to altered provisions, and the growing need to adapt the UAV resulting from decisions in cases and arbitrations led to a new UAV form in 1989.[81]

English Features

In England "a building contract is an entire contract for the sale of goods and work and labour for a lump sum price, payable by instalments as the goods are delivered and the work is done",[82] with a special feature being permanency of its result on land of another.

The scope of the law relating to building contracts and some of the problems that arise derive from the nature of the construction process, its organisation and the relationship of the parties involved. The employer will ordinarily engage the services of an architect or engineer to carry out the design. He may directly or through the architect engage a quantity surveyor and other consultants to draw up the measurements and quantities for the work the subject of the architect's design for the purposes of seeking estimates. The design itself will require detailing, and parts of this may be done by or in conjunction with specialists who carry out that element of the work as a subcontractor. The placing of the contract will generally be by seeking tenders on the basis of the work shown in architect's or engineer's drawings, specifications and other documents, and upon unqualified acceptance of a tender, a contract comes into existence. The basis upon which the documentation is drawn will frequently be the terms of a standard form of contract, whether modified or not. The works will be carried out by the contractor under the supervision of the architect or engineer, whose authority will be governed by the terms of the form of contract. Numerous difficulties invariably arise for which the terms of the form of contract may or may not

[80] Uniforme Administratieve Voorwaarden.

[81] Published by the Netherlands Institute for Construction Law. Adopted by the Ministries of Housing, Planning and Environment, Transport and Communications and Defence in August 1989.

[82] Lord Diplock in Modern Engineering (Bristol) Ltd. v Gilbert Ash (Northern) (1974) A.C. 689 at 717 (H.L.).

have made provision. The contractor may have been required to sub-contract parts of the works or may have done so of his own volition, and the estimating and entering into sub-contracts will have followed a similar process.

The organisation of this process and the roles of the respective parties have been moulded in England by the use of forms of contract the drafting of which has variously reflected the administration of the building industry, or constrained it, or ignored its practices. The influence of standard forms of contract is important because they have, in many cases, become adopted as reflecting norms, from organisation to responsibility and from terminology to perceived risk.[83]

A feature of the English system is the role of the architect or engineer, to which is attributed the requirements of an agent acting on behalf of the employer vis-a-vis the contractor, as well as obligations as to certification, expression of opinions and making of decisions to be carried out in a manner that balances the interests of the employer and the contractor. The importance attached to the architect or engineer may well have contributed to attitudes towards responsibilities that fostered the notion of a division between liabilities for design and liabilities for putting that design into effect, with the former remaining in the sphere of the architect or engineer. This aspect represents a distinguishing feature between attitudes in England and those in France, where the English approach to the role of the architect/engineer is decidedly foreign. Whatever may have been the cause or effect, they are undoubtedly reflected in the respective legal regimes.

The Standard Form of Building Contract, issued by the Joint Contracts

[83] The result in practical terms is that the alteration or modification of standard terms proposed by an employer when seeking tenders may well result in a cautious and costly reaction from contractors, simply deriving from the fact of the proposal without regard to study of the potential effects of the alteration.

Tribunal, JCT, was formerly known as the RIBA contract.[84] There are variants of the form, each of which is regularly the subject of suggested amendments. The earliest version was issued in 1909, although a form had been in use at the latter part of the nineteenth century.[85] Of the variants, forms for use with or without bills of quantities are available, together with a Local Authority and a private version. After 1909, editions were issued in 1931, 1939, 1963 and 1980. The 1980 edition adopted many of the provisions and followed substantially the drafting of the 1963 edition. Related documentation is available for use with the 1980 form in connection with nominated sub-contractors and suppliers the terms of which are linked to the 1980 form. For use in smaller projects the JCT has produced an Intermediate Form of Building Contract,[86] and an agreement for minor building works. Further, the JCT has produced a standard form of building contract with contractor's design and also a form of management contract.

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[84] Royal Institution of British Architects. The RIBA is now but one of the organisations that constitute the body of the JCT. The history up to 1963 was described in the restrictive trade practices case of In re: Birmingham Association of Building Trades Employers' Agreement (1963) 1 W.L.R. 484, (referred to under Future Directions: Standard Conditions and EC competition law) in the following terms:
"The main forms of contract had their origin as far back as 1903 when, as the result of collaboration between the R.I.B.A. and the federation, the first standard form of building contract was issued. Revised versions were issued in 1909 and 1931, and in the latter year there was set up a permanent standing committee of the federation and the RIBA, which later came to be known as the Joint Contracts Tribunal (the "JCT"). In 1947 its membership was widened to include representatives of the RICS, the body representing quantity surveyors, and in 1957 it was further enlarged by the inclusion of representatives of six bodies representing local authorities ... The JCT contains no direct representation from the body of private building owners, but it is claimed, with some justification, that such direct representation is impracticable and that the interests of private building owners are looked after by the members from the RIBA and RICS. There is no representative on the JCT from any government department. In 1937 an edition of the main contract forms adapted by use by local authorities was issued and the forms for use by private building owners were reissued in revised form in 1939. There have been minor revisions of all four main contract forms since then, the forms current at the time of the hearing of the reference having been issued in 1957. During the year ended March 31, 1961, over 91,000 of the main contract forms were sold.
The form of tender to be used by nominated suppliers was negotiated between the federation, the RIBA, and the RICS, and issued in 1956. The purpose of this form is to ensure that the architect invites quotations from prospective nominated suppliers on terms which are not at variance with the terms of the main contracts. It was not explained in evidence why a similar form of tender had not been produced for use by nominated sub-contractors whose function is, apart from supplying materials, to execute and complete sub-contract works.
As regards the two forms of sub-contract, neither the JCT nor the RIBA, was responsible for their drafting or issue. The buff form, designed for use as between the builder and sub-contractors nominated by the architect, was first published in 1936, the current edition having been issued in 1950. The blue form, designed for use as between the builder and sub-contractors not nominated by the architect, was published in 1956. During the year ending March 31, 1961, 47,637 copies of the buff form and 6,032 of the blue form were sold.
Finally, the form entitled conditions of estimate for use in small works was recently prepared by the federation without consultation with any other body and first published in July, 1961. During the first four months after publication 26,000 copies were sold."

[85] Clements v Clarke (1880) Hudsons Building Cases (4th Ed.) Vol.2. p.54, and the form is set out in the 3rd Edition, Vol. 2. p. 630.

[86] D. Royce, "Tugging at the Contract: Some Preliminary Reflections on the JCT Management Form of Building Contract" (1984) 1 Const. L.J. 97.

The JCT 1963 form was criticised both in and outside the courts on numerous occasions,[87] and described in one case as a "farrago of obscurities".[88] The 1980 form was produced in an attempt to meet some of the criticisms, which included, apart from complexity, failure to deal adequately with problems encountered in practice, the placing substantially all the risk of the unforeseen on the employer, and pretending to be a lump sum price when including a multitude of propositions for increases. The 1980 form has also been criticised for failing to grapple with the major problems of the 1963 form,[89] but it must be appreciated that the wording may represent a balance between views amongst the representatives of the constituent bodies, rather than the will of the draftsman.[90]

In familiarity, the JCT form is the major form in relation to building work in England, whilst its counterpart for engineering works is that produced by the Institution of Civil Engineers. The ICE form of contract is now in its 6th edition, published in 1991, after a comparatively late first edition in December 1945. The ICE conditions were used as the basis for the preparation of the Conditions of Contract (International) for Works of Civil Engineering Construction by FIDIC.[91] The FIDIC 4th edition was published in 1987 and represents a markedly English approach such that: "it is difficult to escape the conclusion that at least one primary object in preparing the present international contract was to depart as little as humanly possible from the English conditions".[92] Notwithstanding the derivation and the drafting, the FIDIC conditions are extensively used in international civil engineering work,[93] and under legal systems not restricted to those based on common law.[94]

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87 Professor Duncan Wallace has been a consistent critic, for example, Construction Contracts: Principles and Policies in Tort and Contract, Ch. 29, p. 501: A Criticism of the 1963 RIBA Joint Contracts Tribunal Contracts, (originally puhlished in The Quantity Surveyor, 1973).

88 Edmund Davies L.J. in English Industrial Estates Corporation v Wimpey (George) & Co Ltd. (1973) 1 Lloyds Rep. 118 at 126.

89 Professor Wallace op. cit. Ch. 30, Resistance of Standard Forms to Change.

90 In relation to the ICE conditions, described as: "a delicate compromise", Humphrey Lloyd Q.C. 5 I.C.L.R. 31.

91 Fédération Internationale des Ingénieurs Conseils.

92 Professor Duncan Wallace, The International Civil Engineering Contract, stated in relation to the 3rd Edition, but equally applicable to the 4th.

93 FIDIC also haveconditions for Mechanical and Electrical Works, and terms for use in dredging projects.

94 M. Frilet, How Certain Provisions of the FIDIC Contract Operate Under French Laws. (1992) 9 I.C.L.R. 121.

French Features [95]

The Code Civil categorised the building contract as it had been under Roman law, *du louage d'ouvrage et d'industrie* ,[96] of the hire of work and skill; a contract by which someone entrusts the execution of a definite work to a contractor who will carry it out in an independent way by the performance of material or intellectual acts, but importantly without the power of an agent for the employer.

There are particular features attaching to the personnel.[97] The *maître de l'ouvrage* is the client/employer, and in public works there is control by virtue of the *Code des Marchés Publics* , which regulates procurement and administration of projects in that sector.[98] The project developer, *promoteur immobilier* , is and was seen as an agent of the *maître de l'ouvrage* , and while in principle an agent has no liability for latent defects, this point coupled with the *promoteur* falling outside the scope of responsibilities attaching to those subject to the rules *du louage d'ouvrage* left a lacunae in the protection of purchasers. Amongst the legislative reforms of 1971,[99] 1972 and 1978,[100] the *promoteur* became subject to like responsibilities as others involved in the construction process, notwithstanding the work being executed by others on behalf of the *maître de l'ouvrage* .

The engineer in France is highly respected being the principal designer for

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[95] Land Development in France and Belgium, Law and Practice, British Institute of International and Comparative Law, Special Publication No 5 (1964) provides an historical guide. Also, G. Liet-Veaux, le droit de la construction, 1987.

[96] Book 3, Chapter III of the Code Civil bears this title.

[97] C. Cavallani and Y. Kaffestin, Le Guide de la Construction: les hommes, les moyennes, les méthodes, Ed. Moniteur, 1988. This provides a full review.

[98] For example, the *maître de l'ouvrage* is constrained in the manner of appointment of designers and contractors. In the private sector the *maître de l'ouvrage* may include a package deal operator, *ensemblier*. The *promoteur* is the project developer who puts together the scheme, takes on responsibility for working it out and co-ordinates its execution or has it co-ordinated, with a view to transferring ownership to others.

[99] Loi no. 71-579 of 16 July 1971, Articles 32 and 51, Du contrat de promotion immobilière, brought in new Articles 1831-1 to 1831-5.

[100] The 1972 amendment was by Loi no. 72-649 of 11th July 1972, Articles 21 and 22. The 1978 amendment was by Loi no. 78-12 of 4th July 1978. In 1978 also particular rules regulating the *contrat de promotion immobilière* by Decrees nos. 78-621 and 622 of 31st May 1978.

most infrastructure and public works,[101] whilst architecture has been regarded as an important liberal profession strongly associated with the fine arts.[102] As a result of their background, French architects were, until the 1960s, unequalled in the preservation of historic and the design of grand buildings but were not regarded as in tune with the latest techniques, such practical details being delegated. The *maître d'oeuvre* is the client's representative, and may be an architect.[103]

In both public and private sectors the law requires that an architect sign the application for a *permis de construire* for work on most buildings. There is no obligation to employ the same architect, or indeed any architect, for work on the project once the *permis* is obtained. In the private sector use is made of *bureaux d'études* or the contractor for design work so that some only of *maîtres d'oeuvres* are architects.[104] The architect does not issue certificates, and does not have an impartial role as between employer and contractor, as in England. He acts for the employer and in his best interests. Bills of quantities are not generally used in France in the form known in England and there are

[101] Engineering as a profession in France is dated from 1672, when Vauban formed a corps of military engineers In 1720 this became the *Corps des Ponts et Chaussées* and in 1747 the *Ecole des Ponts et Chaussées* was formed. This is the premier school for civil engineers, in that it not only has a great reputation but also provides a significant number of engineers for the construction industry each year.

[102] M. Huet, Le Droit de L'Architecture, 1990. France was the first country in Europe to establish a central organisation for architects when, in 1671, Colbert created a Royal Academy of Architecture to provide a suitable artistic background for the reign of Louis XIV. Architects were trained to design palaces and public buildings. During and after the Revolution, the need for more military and public works introduced a requirement for more practical design skills. Civil engineering was placed on a firm foundation by Napoleon and architecture, separated from civil engineering, was linked for educational purposes with other fine arts in the *beaux arts* system. It continued until 1968 to be a part of this system through the *Ecole Nationale des Beaux Arts* (ENBA) and associated *ateliers*.

[103] In the public sector, there is a requirement that there be a group of specialists capable of ensuring the satisfactory execution of the designs. The function of the *contrôleur technique* is to check the structural soundness of the building, its construction and its safety. The employment of the *contrôleur* is obligatory for establishments open to the public or which present particular technical difficulties. It usual to engage a *contrôleur technique* employed by, or part of, *bureaux de contrôle*. in order to secure the now compulsory insurance.

[104] There is no firm figure as to the proportion, though estimates put the architect as being responsible for about 30% of private wok; J.L. Meikle and P.M. Hillebrant, The French Construction Industry, A Guide for U.K. Professionals, Construction Industry Research and Information Association, Special Publication 66, 1989. Sometimes an architect will simply be used as a stamp a design prepared by a BET so that the *permis de construire* may be obtained.

no standard rules of measurement.[105]

The insurance regime has a significant practical effect in France. It was introduced as compulsory in 1978, together with changes in guarantee obligations to widen their sphere of application to all those involved in the construction process. The insurance scheme, *dommage ouvrage* cover, aims to ensure that the *maître d'ouvrage* will secure money to repair damage, with the result that employer's claims for defects are litigated less, with litigation after the distribution of insurance proceeds determining responsibility between those actually involved. A second scheme of insurance is the *police unique du chantier* . This is a project, rather than a blanket, policy which includes both the *dommage ouvrage* and *responsibilité civile décennale* insurance.[106]

The traditional method of contracting has been the *lots séparés* ; the letting of separate contracts to each trade or group of trades.[107] This avoids the problems of nomination of subcontractors or suppliers in the English system. Otherwise, methods are to appoint a general contractor responsible for the whole project; alternatively contractors group together, taking joint responsibility for all parts of the work, *groupement des entreprises solidaires* ,

[105] The *métreur vérificateur* is the nearest to the quantity surveyor that exists in France *Métreurs* and *vérificateurs* perform a narrower range of tasks, have traditionally held technical status only, and are not regarded as being on the same level as architects or engineers. Historically the *métreur* and the *vérificateur* were separate and the functions performed are still essentially distinct, though they are now normally performed by the same professional practice. They are usually appointed by the architect or engineer, rather than by the employer, and also work for contractors. The *métreur* is a measurer and is involved in the construction process before and after the tendering stage. The *métreur* assists in the comparison of tenders submitted, the preparation of cost estimates and specifications. He may also undertake some coordination of the works on behalf of the client. Working for the contractor, the *métreur* will measure the quantities from the drawings, assist in estimating tender prices, measure on site for monthly valuations, measure for the settlement of subcontractor or inter-contractor accounts and assist in the preparation of the final account. He may assist in coordination of a *groupement*. The *vérificateur* essentially checks the work done by the contractor's *métreur* on behalf of the architect, *bureau d'études* , or employer.

[106] Bloch, Responsabilitès et assurances dans le batiment et les travaux publics, 1982, Edition Eyrolles. The cost of the construction insurance system is substantial, especially as there tends to be double insurance by client and design and construction team, with many participants to be insured. Estimates range from 3-4% to 7-8% of the cost of buildingfor such insurance. The organisation and operation of all building construction insurances is closely linked to the *bureaux de contrôle* or *contrôleurs techniques agréés* .

[107] French building contractors are broadly divided into those undertaking *gros oeuvre* , structural works, and those undertaking *second oeuvre*, more likely specialist contractors. The *entreprise* is the contracting company. Many are small separate trades contractors, and a general or main contractor is the *l'entreprise générale*. The *ensemblier* is an organisation which puts together package deals (*clé en main*). New approaches are unlikely to alter the basic premise of overall responsibility of the contractor; M. Frilet, Management Contracting: A Civil Law Approach Based on the French Example. (1993) 10 I.C.L.R. 337.

or for a particular piece of work, *groupement des entreprises conjointes* .[108]

Invitations to tender, *l'appel d'offres* , are frequently made on specification and sketch drawings rather than on bills of quantities and detailed drawings, leaving a design element and choice to contractors such that the lowest price will not necessarily be the yardstick for selection.[109] Negotiated contracts, *marchés de gré à gré* , are permitted by the *Code des Marchés Publics* where the project is virtually a repeat order; where the work is so complex or specialised that there is only one contractor able to undertake it; or if the tendering process has proved unproductive. Contracts in the private sector frequently adopt the standard AFNOR terms and, by reference, the *cahier des clauses administratives générales* (CCAG), to which may be added specific matters relating to the project.[110]

Anecdotally, there appears to be less dispute on contractual matters between contractor and employer, and a greater degree of mutual trust than obtains in England.[111] In France the contractor's broad responsibility to build a viable project, together with his involvement in the final design, means that he carries obligations towards the owner that in England are frequently the source of argument where they straddle the lines of the functions and responsibilities of contractor and separate designers.

The construction process is positively perceived as different from the British process.[112] The tradition of the construction industry in England is such that many of the technical functions necessary for the proper execution of works

[108] *Groupement des entreprises solidaires* is effectively a joint venture, in that each of the contractors is responsible for the whole project and takes the risk that others contractor may default. In the *groupement des entreprises conjointes* the work is formally divided up and no contractor bears responsibility for another. This system is used substantially.

[109] The *Code des Marchés Publics* permits the tender which is "economically the most advantageous" to be accepted. There are exceptions, notably if the submitted bids are *infructueux* , that is unfruitful or unproductive, when the employer may so declare and either go out to tender again or negotiate.

[110] Villard, Bachelot and Romero, Droit et Pratique des marchès publics de travaux, 1981, Edition du Moniteur. The CCAG will be referred to in the contract document but not appended (any more than British Standards Institution standards are attached).

[111] This may well have a foundation in the approach to the construction process and the insurance system.

[112] M. Frilet, How certain provisions of the FIDIC Contract operate under French Law. (1992) 9 I.C.L.R. 121. Qualitative comparison is impossible. Both systems get projects completed, more or less satisfactorily. From the employert's point of view the process is possibly less painful in France through the influence of the insurance regime, whic tends to reduce an area of confrontation. The actual control of physical development in France based on the permit for virtually all construction works is regarded as comprehensive.

are not performed within the contractor's own organisation, but by the engineer or Architect.[113] To French eyes this is a limiting of the role of contractors, and may be more, an interference in the tradition for contractors to undertake technical functions.[114] While commercial instincts appear to be influencing this, the difference between the traditional function of the engineer under the English approach and the *maître d'oeuvre* in French projects remains substantial, and the legal foundation from which the FIDIC conditions are derived affects their application under civil law, instanced not only by different results under the same clause, but by different legal routes required to achieve the same practical result.[115]

The Framework for Public Works

The French system has developed over two centuries an approach towards contracting deriving from the origins of the Code Civil provisions and their interpretation, but also from the principles and practices developed by the administrative courts under the *droit administratif* . In 1799 the administrative courts were given jurisdiction over disputes relating to public works,[116] and this was the commencement of the development of principles governing such contracts which have departed in notable respects from the Code.[117] The reason for applying different legal solutions to public contracts, which is a corner stone of the approach of French law to contracting, lies in the fact that these contracts are performed for the benefit of the public interest, so coming before private interest. The administrative courts have been free to develop this aspect since, unlike the civil courts, they are not bound by the Code Civil provisions, albeit in practice, when there is no need to develop specific principles for public contracts, the Code is applied.[118]

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[113] Save for the particular JCT form "with Contractor's Design", but even here the contractor's design element is contemplated and provided for as a distinct portion of the whole works.

[114] With the exception of artistic works to which many contractors wished to limit the role of architects. Comment by Frilet (1992) 9 I.C.L.R. 121 suggests that this view of the architect may have been influenced by the decennial liability and ease by which the employer in many instances may have recourse to the contractor when the default is not attributable to him.

[115] M. Frilet, How certain provisions of the FIDIC Contract operate under French Law. (1992) I.C.L.R. 121.

[116] Article 4 of the law 28 *Pluviôse , An* VIII, 16th February 1799. This provides: "The *Conseil de préfecture* shall have the authority in respect of difficulties which may arise between public works contractors and the administration in relation to the interpretation or the execution of their contract provisions".

[117] A particular feature considerered under Relief from Performance is La théorie d'imprévision. The administrative court is the *Tribunal Administrafif* , with the *Counseil d'Etat* at the highest level.

[118] Jacques Catz, Les constructeurs et le risque du sol , Edition Le Moniteur 1985, p. 225.

It is not practically possible to contract out of the CCAG provisions,[121] and as major works undertaken in France and those French-speaking countries following the French tradition are mostly public works, the CCAG conditions play in reality a leading role in civil contracting activities and are at least equal to the role played by the ICE conditions in the UK. It is noteworthy in this respect that there is no set of standard conditions published in France exclusively for engineering works of a private nature.[122]

In practice, French contractors are used to relying upon the CCAG, and for private works the AFNOR, standard conditions which differ in approach from the FIDIC conditions, and which have resulted from many years of implementation and refinement. In the circumstances where employers and contractors alike have been governed over time by accepted principles, some written in the CCAG and others not, although generally acknowledged, practice and usage plays an inevitable role. Important issues, such as contractors' liability, allocation of risks, limits of architects' and designers' responsibility are well-trodden aspects and it is frequently felt that there is no need to address them in detail in general or particular conditions.

It is understandable with this background why FIDIC provisions may create misunderstandings if they are sought to be utilised in France and countries following the French tradition. It is clear that a range of usages and civil law premises will be in the minds of those parties having a practice of contracting in France and the impact will restrict, supplement and sometimes alter the impact of the FIDIC conditions, and a court in a civil law state may well interpret and apply particular clauses in a different fashion from a court in a

[121] Departure from a CCAG provision must be express and exceptional in cases of absolute necessity, Guide for the attention of employers and engineers, Circular of 19th Oct. 1976.

[122] J. Montmerle and A. Caston, Passation et execution des marchès des travaux privés, 1979, Edition du Moniteur. The AFNOR terms, 1991, is a set of standard conditions primarily applicable to private building works and not engineering works.

in a common law country.[123]

[123] FIDIC departs from the general principle found in Article 1788 of the Code Civil that the risk is on the contractor up to taking over, in that while part of the risks derives from causes which may be characterised as *force majeure* and as such under French laws not attributable to anyone, other risks can in fact be attributable to an identifiable party, being the employer, clause 20.4(f) or a third party designer, clause 20.4(g). Under French law, these categories of "risks" do not fall within the scope of *force majeure* and unforeseeable circumstances, which have separate consequences of their own. In addition, the question will arise as to whether the risks specified in clause 20.4(a), (b), (c), (d), (e) and (h) cover *force majeure* as understood under French law and whether any other *force majeure* cause will be an employer's risk or not. Although clause 20.4 in the light of clause 20.2 leads to the conclusion that any *force majeure* event, not expressly listed, is at the risk of the contractor, it is not unlikely that the French courts would consider (based on Articles 1156, 1162 and 1164 of the Code Civil) that a *force majeure* event of the same nature should to be at the employer's risk. Another point may lie in the recognition by the French courts that the "risk" of loss or damage due to faulty design not provided by the contractor or for which he is not responsible is not an "excepted risk" in spite of clause 20.4(g) to the contrary.

[2] **CONTRACT AND PRE-CONTRACT**

1 Contract Formation, Classification and Conditions

A "legally binding agreement" describes a contract under common law, but not the concept. The bargain is a central aspect of contract formation, and is at least partially responsible for the doctrine of consideration,[1] the historical antecedents of which distinguish common law from civil law notions of contract, and its scope; but for the purposes of building contracts, a feel for the contrast may be gained from the approach to the elements of contract formation and a view of the concepts of offer, acceptance and intent.

The elements required at common law in England are generally expressed to be that a contract must be based on mutual assent and there must be mutual agreement, that is: "a final and unqualified expression of assent to the terms of an offer",[2] with consideration,[3] an intention to make a contract, legal capacity, and no statutory or common law rule that renders the contract void. In France the means of formation of a contract are based on the definition in Article 1101 under which a contract is an agreement by which one or more persons oblige themselves toward one or more others to give, to do or not to

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1 P. S. Atiyah, Consideration: A Restatement, in Essays on Contract (1986) p. 179, reproducing Contracts, Promises and the Law of Obligations (1978) 94 L.Q.R. 193.

2 Chitty on Contracts, 26th Edition, para 54.

3 After the creation of the Law Commission in 1965, item 1 of the First Programme of law reforms was the codification of the law of contract. Item 3 included the topic of third party rights in connection with which a substantial amount of work was done in conjunction with work on consideration. It was then felt that reform of privity could not usefully be undertaken without reform of the doctrine of consideration. In 1973 it was decided to suspend work on the production of a contract code (8th Annual Report 1972-73 No. 58 paras. 3-4) but other projects have proceeded without any reassessment of the doctrine of consideration, including the question of third party rights in the recent Law Commission, Consultation Paper No. 121. Meanwhile in Williams v Roffey Bros. & Nicholl (Contractors) Ltd. (1990) 2 W.L. R. 1153 (C.A.), "All three Judges agreed that the promise of additional payments was supported by consideration but did not agree as to where (it) was to be found. The adoption ... of a factual, rather than a legal definition of consideration affects a suble but significant change in the law relating to modification of contract", R. Halson, Sailors, Sub-contractors and Consideration. (1990) 106 L.Q.R. 183.

do something.[4] Contract is considered as resulting from an agreement between the parties under which to be given the force of law the parties must intend to create legally enforceable obligations between themselves.[5]

The concept of contract in France appears wider than that of the common law, in the sense that whilst the principle that a contract represents the result of agreement is central, there are fewer strictures that derive from the common law understanding of a contract as a promise in return for good consideration.[6] The distinction is felt in the differences that flow from this. There being no doctrine of consideration in civil law as a requirement for the validity of a contract that the parties intend to make,[7] other features exist to achieve a requisite degree of seriousness, namely the concepts of *objet* and *cause*.

Article 1108 of the Code Civil identifies four elements that must be present for a contract to be valid.[8] (1) The most important is assent of the parties, expressed in terms of offer and acceptance. Where dispute exists the court will decide if the parties have reached a meeting of minds on the essentials of any contract, a meeting of two unilateral acts of will. (2) The parties must have the legal capacity to enter into contractual relations. (3) There must be a definite object, *objet certain*, forming the subject-matter, *matière*, of the agreement.[9] (4) There must be a valid reason, *cause licite*, for entering into the agreement, being a twofold requirement of a *cause* and that it must be

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[4] Article 1101: *"Le contrat est une convention par laquelle une ou plusieurs personnes s'obligent, envers une ou plusieurs autres, à donner, à faire ou à ne pas faire quelque chose."*

[5] Planiol, Ripert and Esmein: Traité Pratique de Droit Civil, 68, 99. The word contract is translated both as *contrat* and *convention*, albeit that in French law *contrat* is a class of *convention*, and are all *conventions*; but the reverse is not so, not all *conventions* are contracts. *Contrat* creates obligations, and the distinction is that *conventions* may create another legal consequence such as the transfer of an obligation, B. Nicholas: French Law of Contract, 1982, 36. Italian legal terminology uses only the single word *"contratto"*.

[6] Lorenzen: Causa and Consideration in the Law of Contracts (1919) 28 Yale L. J. 621; von Mehren, Civil Law Analogues to Consideration: An Exercise in Comparative Analysis (1959) 72 Harv. L. Rev. 1009.

[7] de Moor: Contract and Agreement in French and English Law (1986) 6 Oxford J.L. Studies, 275.

[8] Article 1108: *"Quatre conditions sont essentielles pour la valiidité d'une convention: Le consentement de la partie qui s'oblige; Sa capacité de contracter; Un objet certain qui fonne la matière de l'engagement; Une cause licite dans l'obligation."* [Four conditions are essential for the validity of a contract: The consent of the party who obligates himself: His capacity to contract: A certain *objet* forming the subject matter of the engagement: A valid *causa* in the obligation.]

[9] *Objet* is used in general senses in the Code Civil: the *objet* of the contract is in the obligations it creates, the *objet* of a vendor's obligation is included in the *prestation* consisting in the delivery of the thing and the *objet* of the *prestation* is the *chose* itself.

licite.[10] Whilst not easy to transpose, it reflects the need for a serious reason for a person to have bound himself.

Objet and cause as concepts assist in understanding the approach of the civil law. All legal systems have to resolve whether every bilateral agreement is to be treated as a contract, or whether some additional element is required to make transactions enforceable. Capacity and consent or agreement are universal, and in France *cause* fulfils a view that a serious promise must be based on some comprehensible and permitted purpose within society.[11] The concept has altered over time but represents something akin to the typical reason for which people make the agreement in question.

By Article 1131[12] an obligation without *cause*, or with a false or mistaken *cause* or with an illicit *cause*, cannot have any effect. This additionally reflects the impact of an impossibility.[13] Article 1132[14] provides that an agreement is none the less valid even though the *cause* is not expressed, and Article 1133[15] renders a *cause* illicit when prohibited by law, or when contrary to morality or public policy.[16] There has over time been much debate as to the true function of *cause*, and by reference to *motif*, not motive, Capitant described *cause* in a manner that represented a classic statement,[17] concluding:

> ["...an obligation cannot be separated from its *cause*: it remains with the obligation throughout its whole existence, it is the fundamental

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[10] By Article 1321 of the Italian Codice Civile a contract is the agreement of two or more parties to establish, regulate or extinguish a legal relationship among themselves, having economic content. The essential elements as described in Article 1325 are agreement of the parties, lawful cause, object, and, in certain circumstances, form. Article 1173 requires that the performance that is the object of a contractual obligation must be of such a nature as to be capable of economic evaluation.

[11] Markesinis, Cause and Consideration in the Law of Contract: A Study in Parallel (1978) Camb. L.J. 53.

[12] Article 1131: *"L'obligation sans cause, ou sur une fausse cause, ou sur une cause illicite, ne peut avoir aucun effet."*

[13] Considered further under Relief from Performance.

[14] Article 1132: *"La convention n'est pas moins valable, quoique la cause n'en pas exprimée."*

[15] Article 1133: *"La cause est illicite, quand elle est prohiitée par la loi, quand elle est contraire aux bonnes mœurs ou à l'ordre public."*

[16] The comment of the English Law Revision Committee in 1937 that: "The French Civil Code recognises *cause* as an element in a contract, but this requirement, which seems to refer to the motive underlying the making of the contract or the purpose for which it is made, appears to be largely academic in character. It does not resemble "consideration or give rise to any of the difficulties ... " has been put in context by the view that there was overstatement if the suggestion was that other systems either enforce all promises intended by the promisor to have legal effects or have managed to render easy of solution the basic problems approached in the common law through consideration; A.T. von Mehren, Civil Law Analogues to Consideration: An Exercise in Comparative Analysis (1959) 72 Harv. L. Rev. 1004.

[17] Capitant, De la Cause des Obligations, Librairie Dalloz, Paris, 1923.

and indispensable condition of its validity."][18]

Validity of a contract under French law also requires that there be no defect in the *objet*, the object of the transaction, the *acte juridique* . It is the element or performance, *prestation* , promised in the contract, and that which exists or the feasibility of performance at the time of contracting. Certain qualities must exist in it, namely for performance it must be juridically possible, legal, certain or ascertainable. The utility of debate here as to the theory is doubted,[19] but it is to be noted as a mechanism for rendering invalid contracts which the common law would categorise under impossibility where the impossibility was extant at the time of contracting.

Common law does not have the same approach to classification of contracts as in civil law. Unilateral and bilateral are terms well understood and the promise exchanged for a promise is understood as synallagmatic[20] Civil law has elaborate classifications of contract viewing transactions as contracts which common law would regard as unenforceable gratuitous promises, so that it has distinctions not required at common law for example, gratuitous and onerous contracts.[21]

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[18] Professor Lawson's analysis, which takes into account the English perception of consideration, concluded that: " ... in modern French law one could well say that *cause* expresses three different notions: (1) Something almost identical with the English consideration, such consideration not being a legal requirement in all contracts, but being merely the result of analysing the vast majority of contracts, which in practice have a consideration; (2) the notion of the interdependence of promises, which is very closely related to the notion of consideration; and (3) the motive, or rather perhaps we should say the object, of the parties in entering into the contract. French legal opinion seems more and more disposed to recognise the difficulty of using one word to express these different notions .... *Objet* is what is promised, the content of the promise. *Cause* is, in onerous contracts, the consideration for the promise, in gratuitous premises, the liberal intent; and it is uniform for all contracts of a type. *Motif* is the concrete individual motive which has introduced a part to make a promise or enter into a contract ... "; Buckland & McNair (Ed. Lawson) Roman Law and Common Law - a comparison in outline, 1965.

[19] A comparative view is in G. Gorla, The Theory of Object of Contract in Civil Law: A Critical Analysis by means of the Comparative Method (1954) 28 Tulane L.R. 442.

[20] Hongkong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd (1962) 2 Q.B. 26 at 65; United Scientific Holdings Ltd v Burnley Borough Council (1978) A.C. 904 at 928 c.f. contracts and the common law term "condition".

[21] Article 1105: *"Le contrat de bienfaisance est celui dans lequel l'une des parties procure à l'autre un avantage purement gratuit."* [A gratuitous contract is one in which one of the parties procures a gratuitous advantage for the other.] An aleatory contract, derived from the Latin *alea*, dice, refers to one where a party's duty to perform or the extent of it depends on an uncertain event. Article 1104 distinguishes between commutative contracts in which performance of one party is regarded as equivalent of the other's, and aleatory contracts in which the equivalent is the chance of gain or loss for each party depending on the occurrence or otherwise of an uncertain event. Article 1964 renders an aleatory contract one where the risk of gain or loss for the parties or one of them so depends, but the important point is that under neither is the contract one in which performances are exchanged for each other. The distinction is not used in English law but is relevant to a view of remedies based on the importance of the term broken.

In civil law the synallagmatic contract is not only bilateral in the sense that each party undertakes an obligation, but it has the characteristic that the performance promised by one party is to be exchanged for that of the other. For its creation, both promises must be possible and it will fail if one is impossible *ab initio*. For its function, failure by one party to perform his part of the promised exchange will justify the other's refusal to perform; so giving rise to the defence of *exceptio non adimpleti contractus* . In the Code Civil Article 1102 uses the expression "*synallagmatique ou bilatéral* " and the concept of exchange appears in Article 1106.[22]

Justification for refusal to perform can be seen in common law as dependent on the importance of the term broken by the other party. Condition is used to refer to a future uncertain event on which the effect of a contractual obligation depends, and to terms in contracts (conditions of contract). It is also descriptive of a particular type of term, namely that specifying an event on which a party's obligation depends and the event may be the due performance of the other party's undertaking.

In France Article 1168 adopts the the sense of condition as an event when it describes a conditional obligation as one depending on a future uncertain event, and Articles 1169-1180 which define various types of conditions use the word in the same sense. But when Article 1184 provides that in all synallagmatic contracts there is an implied resolutive condition in case either party does not comply with his engagement, this seems to be by way of implication rather than a reference to an event. Nevertheless a condition is an event in its primary meaning and as in Article 1168 it is future and uncertain.

A term is any stipulation, but 'term'[23] in French law refers more narrowly to

[22] By contrast Article 1103 defines a unilateral contract as one in which one party (or several) is under an obligation towards another without there being any undertaking on the part of the latter, and the civil law brings into the category of unilateral contracts many transactions which the common law would not regard a contracts for lack of consideration. Hence the need to consider the approach to contracts to benefit third parties and the need to consider restitution as a remedy. In France within the category there is the gratuitous contract, *contrat de bienfaisance*. It is nevertheless a contract, even though lacking the important element at common law in a unilateral contract namely that the promise only becomes binding when the stipulated act or abstention has been performed by the promisee.

[23] Article 1185. *Le terme diffère de la condition, en ce qu'il ne suspend point l'engagement, dont il retarde seulement l'exécution.*

provisions that specify duration of a contract or the time when its performance is to commence or end, and it is distinguished by being certain to occur from a condition.

In English law, an express term specifying a performance to be rendered by one party may be a condition precedent or an independent premise, but in civil law conditions are seen as contingent and "condition" is not used in relation to the defence of refusal to perform, so that civil law would not say that A's duty to do the work was a condition precedent to B's duty to pay, rather that A's duty must be performed in advance of B's.

2 Elements of Offer, Acceptance and Intent

Under common law the manifestations of assent must be referable to each other and in this sense there must be offer and acceptance.[24] The offer must be definite and certain. Expressions of a general willingness will not suffice and it must be sufficiently detailed so that acceptance can result in a complete agreement.[25] Offers may be terminated by rejection, counter-offer, lapse of time, death or incapacity, and, revocation. The common law feature of the ability to revoke an offer at any time prior to its acceptance, whilst notionally the same in France,[26] is in contrast with Germany,[27] and its impact is only marginally lessened by acceptance being effective not when received but when posted, even if this is interpreted as running counter to the consensual nature of contract.[28]

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[24] Although contractual relations may be found where there is not the ability to find a contract by applying the traditional analysis; G. Percy Trentham Ltd. v Archital Luxfer Ltd and others (1993) 1 Lloyd's Rep. 25 (C.A.) "... in this fully executed transaction a contract came into existence during performance even if it cannot be precisely analysed in terms of offer and acceptance" per Steyn L.J..

[25] It seems that the common law is generally more reluctant than the civil law to classify open offers to the public, advertising and commercial communications as offers rather than as mere invitations to treat; Nicholas: The French Law of Contract (1992).

[26] The principle by which an offer can be withdrawn until acceptance has been substantially modified by the courts. Without a specified limit a reasonable period, *délai raisonnable*, is imposed and premature revocation can then be compensated. The legal basis has been formulated as a tort or precontract.

[27] The offeror is bound by his offer in that he cannot withdraw it for the period specified, or if none specified then for a reasonable time. By the BGB it is not merely a duty not to withdraw but no power to do so.

[28] The absolute revocability of offers was, with safeguards, rejected in the Vienna Convention Relating to a Uniform Law on the International Sale of Goods (1964), Article 16(a).

In France the offer is a declaration of will, unilateral, and by which there is a proposal to conclude an agreement. In contrast to the common law, doubt is more often resolved in favour of an offer,[29] and characterisation as an offer of any proposal which does not clearly indicate contrary intent leads to contract at an earlier stage than under the common law perception, with less likelihood of the contract/no contract argument that affects the construction field in England.[30] An offer to contract may be expressed by any means provided the intention to contract is certain. This intention may be implied from the circumstances,[31] and intention appears more readily implied from the continuation of former contractual relations by the parties in that the *tacite reconduction* of a previous contract amounts to the conclusion of a new contract.[32]

The legal nature of an offer is a unilateral expression of will and may not be binding upon the offeror since under French law unilateral acts may not create obligations. As a consequence, an offer may be withdrawn by the offeror until accepted by the offeree. The withdrawal prevents the formation of a contract, but the offeror may be liable in tort for the damage he has caused to the offeree if the withdrawal is wrongful.

Proposals to enter negotiations do not in France suffice as an offer, and this is entwined with the general requirement that the material terms must be within the offer for acceptance to create contractual relations. Where some of the terms are not within the offer a contract may still be concluded, provided they are capable of being determined whether by reference to a formula, or by some other kind of mechanism that does not necessitate another declaration of will by the parties.[33] This feature reflects the Roman law requirement as to the price being fixed or capable of ascertainment, and the nature of the result

[29] Display in a shop window of an article with a price is an offer, and is not seen as an invitation to treat.

[30] For example, Peter Lind & Co. Ltd. v Mersey Docks and Harbour Board (1972) 2 Lloyds Rep. 235. This is apart from argument on the nature of disagreed terms.

[31] An illustration of the French approach is in the case of the taxi, the presence of which at a rank with the driver at the wheel was found to constitute an offer to carry the passenger who by opening the door accepted it, with the driver committing a breach in moving off before the passenger could get in, namely breach of the obligation to transport the passenger safely to the destination; Cour de Cassation, Cass. civ. 2nd December 1969. D. 1970, 104, note G.C.M.

[32] Cass. civ. 1, 18th January 1983, Bull I.n. 6; cass. civ. 3, 6th Jun. 1984. Some legislation prescribes a written form for an offer, for example the Loi of 13th July 1984 protecting borrowers in contracts of loan designed to finance real estate purchases by providing for a written offer of loan to be made by the professional lender setting out the prescribed conditions of the proposed loan.

[33] Cass. civ. 3. 6th June. 1969.

is that achieved in England by the application of two principles.

First is the requirement that the parties must have agreed on all terms which are regarded, objectively, as essential for the contract and to give certainty, and also on those terms regarded by the parties themselves as essential.[34] The like point is found in France in conclusions as to the formation of contracts where disagreement actually exists on minor elements of the contract, but where agreement on those elements was intended as a condition of its formation, the court there determining the real intention of the parties.[35] The formation of a contract need not be based on a unique meeting of minds, but may involve several partial agreements by which the parities reach the final consensus. A partial agreement relating to a contract under negotiation is sufficient for the contract to be concluded, where it covers all the essential elements. This is based on Article 1583 governing sales,[36] providing that the sale "is perfected ... when there is agreement on the article and the price". Agreement on essential elements is necessary, but also sufficient for the formation of the contract; formation is not hindered by the fact that some accessory points remain unsettled.[37] The parties may nevertheless decide, expressly or implicitly, that they consider as essential points still under discussion; in those circumstances the contract will be concluded only upon final agreement.[38] Further, whenever a question arises under a contract which does not provide a clear and precise solution on its terms, the court will interpret the contract in order to discover the parties' 'real' intention. This interpretation may be on the basis of any information,

[34] The formulation of this principle was usefully set out in circumstances of a retrospectively governing contract for the building of a nuclear power station; it having to be established: "... not only that the parties were ad idem on all terms which they then regarded as being requisite for a contract, but also that they had not omitted to agree any term which was, in law, essential to be agreed in order to make the contract commercially workable.", Trollope & Colls Ltd. v Atomic Power Constructions Ltd. (1963) 1 W.L.R. 333, per Megaw J. at p.337. The facts were that an offer was made in February 1959 to carry out certain works for £x. In June 1959, while the parties were still negotiating the terms of the prospective contract the work started. By April 1960 agreement on the essential terms was reached. These included a clause providing for the variation of the contract work and for its valuation and payment with the contract work. By that date the work to be carried out and the price to be paid if there was a contract was different from the price and work in the February 1959 offer, but the conclusion was that a contract came into existence on the terms finally agreed in April 1960.

[35] Cass. civ. 4th January 1937.

[36] Article 1583: *"Elle est parfaite entre les parties, et la propriété est acquise de droit à l'acheteur à l'égard du vendeur, dés qu'on est convenu de la chose et du prix, quoique la chose n'at pas encore été livrée ni le prix payé."* [A sale is perfected between the parties and ownership under law is acquired by the buyer against the seller as soon as they have agreed on the article and the price, even thought the article has not then been delivered nor the price paid.]

[37] Cass. civ., 26th November 1962, D. 1963, 61; cass. com. 17th April, 1980, J.C.P., C.I.-1980, i. 8848.

[38] Cass. civ. 1, 21st February 1979, J.C.P. 1980.ii. 19482, note Fieschi-Vivet.

whether deduced from the contract itself, or from any other document, including pre-contractual discussions.

The second principle in English law is the desire of the law to uphold bargains,[39] and to give effect to business intentions which may often be unsatisfactorily expressed.[40] The mechanism of the implication of reasonableness to overcome lack of definition or certainty fulfils the functions of the formula itself, and of remedying the want of a formula where the parties' intent is present save for a lacunae that may be objectively determined. It covers a substantial area where absence of agreement exists, but reaches a boundary at the points where lack of agreement on terms that the parties regard as essential for agreement before conclusion of a contract reflects lack of intent,[41] and where the state of agreement has reached only that which it is regarded as an agreement to agree.[42]

The French concept of not requiring another declaration of will, in order to result in contractual relations where previously the parties had not reached agreed all elements,[43] appears as a valuable generic description of the extant resolve of the parties sufficiently demonstrating contractual relations, and one to which applied common law techniques may subscribe, if not expressed in that manner.[44] An example of a mechanism is specifically established by Article 1592 by which a third party jointly appointed by the parties to a contract for sale may be empowered to determine the selling price.[45] Whilst

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[39] Nicolene v Simmonds (1953) 1 Q.B. 543.

[40] Hilas v Arcos (1932) 147 L.T. 503. Foley v Classique Coaches Ltd. (1934) 2 K.B. 1. Where a price "to be agreed by the parties from time to time" was held to be a reasonable price if the parties could not agree.

[41] Trollope & Colls Ltd. v Atomic Power Construction Ltd. (1963) 1 W.L.R. 333.

[42] Therefore insufficiently concluded and unenforceable; Courtney & Fairbairn Ltd. v Tolaini Bros (Hotels) Ltd. (1975) 1 W.L.R. 297 (C.A.).

[43] G. Rouhette, The Obligatory Force of Contract in French Law, and C. Jauffret-Spinosi, The Domain of Contract, in Contract Law Today, Anglo-French Comparisons, (Harris & Tallon eds.), 1991.

[44] Even the fact of continued negotiations may not necessarily reflect an intent by the parties that there is a need to "declare their will" by a further agreement for "where negotiations are in progress between parties intending to enter into a contract the whole of those negotiations must be looked at to determine when, if at all, the contract comes into being ... Once the contract comes into being, however, subsequent negotiations by either party seeking, for example, to obtain better terms wil not affect the existence of the previously concluded contract." British Guiana Credit Corpn. v Da Silva (1965) 1 W.L.R. 248 at 255 (P.C.).

[45] Article 1591 provides that the price of a sale must be determined and designated by the parties. Article 1592: *"Il peut cependant être laissé à l'arbitrage d'un tiers; si le tiers ne vent ou ne peut faire l'estimation, il n'y a point de vent."* [It may nevertheless, be left to arbitration by a third party; if the third party refuses or is unable to determine if there is no sale.] This reflects the circumstance provided for under Roman law.

this aspect may in England be derived from the fluidity of the imposition of the objective yardstick of a 'reasonable' price or other element,[46] and the result achieved from its determination by the court,[47] the provision by the parties themselves for third party determination is significant in three respects. Provision for the determination of the element not agreed by decision of a third party has the function of showing the parties' intent to conclude an agreement notwithstanding the outstanding point; and, equally, provision for resolution by arbitration of any dispute or difference covering the area of the element not agreed has this effect.[48] It again constitutes both the actual formula, in that the result fills the place of the element not agreed or outstanding, and the mechanism for achieving that result. It enables the intended conclusion to be achieved even where it fails as a mechanism whether by the positive design, or the negative inactivity, of a party,[49] or otherwise without default of either party.[50]

The facility for an offer to be withdrawn may be limited by its own terms, but in France an offer without such limitation is generally required to be maintained in time at least for the period necessary for the addressee of the offer to give it due examination.[51] In commercial dealings and without an express time limit the formulation is "a reasonable period in which to inform the offeror of his response".[52] Notwithstanding this limitation on withdrawal of an offer, there remains the ability of the offeror to refuse to enter into a contract characterised by personal qualification.[53] This is material in the building field for it gives the offeror the right to refuse to deal with persons other than those having particular qualifications.[54]

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46 Foley v Classique Coaches Ltd. (1934) 2 K.B.1.

47 Beer v Bowden (1981) 1 W.L.R. 522.

48 F & G Sykes (Wessex) Ltd. v Fine Fare Ltd. (1967) 1 Lloyd's Rep. 53.

49 Sudbrook Trading Estate Ltd. v Eggleton (1983) 1 A.C. 444 (H.L.).

50 For example, as in Sudbrook Trading Estate Ltd. v Eggleton the court could have recourse to its own procedures, or in the case of arbitration the facility for further appointment exists in the event of death, incapacity or refusal to act, section 7 Arbitration Act 1950.

51 Code Civil. Article 932 - and so creates a pre-contractual obligatiion.

52 Cour de Paris, 5th February 1910; Cour de Aix, 15th January 1920.

53 The *intuitus personae*, an example is a lease which includes the implied reservation of agreement to the actual person of the lessee; Lyon, 16th May. 1928, S. 1928, 135.

54 Such circumstances may arise after an open invitation to tender, and lead to the employer declaring the tenders *infructueux*, unfruitful or unproductive. It is interesting to note that the decision by the Court of Justice of the European Communities of 20th September 1988, Debr. Beentjes v The State of the Netherlands acknowledged "specific experience for the work to be executed" as a lawful criterion for technical competence under the tender regime.

Under common law, acceptance is a final and unqualified expression of assent to the terms of an offer and its effect is to convert the offer into a contract. The offeree's answer is an acceptance only if it expresses agreement on the elements mentioned in the offer. If the offeree changes an essential element of the proposed contract, his answer is not an acceptance, but a counter-offer, which must, in its turn, be accepted by the initial offeror.[55] As in civil law, silence alone is not sufficient,[56] but silence perceived as conduct referable to an offer is. In France acceptance is also a declaration of will and, without need for consideration, its expression identifies agreement.[57] It may be expressed by any means, provided it is not ambiguous. In this way silence coupled with surrounding circumstances such as a long standing business relationship or trade usage that acknowledges silence as acceptance may have the attributes of expression.[58]

The element of intention at common law is objectively determined, so that the external manifestation is not exposed to inquiry into any inner or hidden intention. Whether more or less certain in consistency of result than an English court's view of what must have been intended, the French courts are not averse to seeking the real intention of the parties to an agreement, not merely their written and other external expressions of intention. Article 1156[59] refers to the common intention of the parties, *la commune intention des parties contratantes*, as distinct from the literal word, so permitting a wider view of intent. Against this use of the subjective as a means of giving a practical interpretation reflecting what the parties really meant, the *Cour*

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[55] Cass. civ. 3, 22nd April 1980, Bull. III.n. 82; cass. civ. 1, 12th March 1985, Bull.I.n. 89, Rev. tr. dr. civ., 1986, 100, obs. Mestre.

[56] Cass. civ. 25th May 1870, S 1870, 1, 341; D. 1870. 1, 257; Trib. civ. Seine 19th April 1893.

[57] The conclusion of the contract has given rise to debate in France between the theory of the transmission, *l'expedition*,, and that of the receipt of the acceptance, as shown in Goudenet: Théorie Génerale des Obligations. J-L. Aubert: Notions et Rôles de l'Offre et de l'Acceptation dans la Formation du Contrat, F. Rodiere: La Formation du Contrat, but certainly an acceptance must conform with the offer. If offer and acceptance take place between absent parties, the meeting of minds is taken to be made at the time and place where the offeree dispatches his acceptance, unless otherwise provided for by the parties; Cass. com., 7th January 1981, Bull. IV.n.14; Rev. tr. dr. civ., 1981, 849, obs. Chabas. Acceptance may create a meeting of minds only if it takes place at a time when the offer is still in force, but late acceptance is ineffective, Cass. civ. 3, 9th November 1983, Bull.III.n. 222; Rev. tr. dr. civ., 1985, 154, obs. Mestre.

[58] Meaning may be given to silence as expressing the requisite intention in the circumstances more easily it appears than under common law, Cass. civ. 1, 20th March 1984, Bull.I.n. 106; existence of prior business relations between the parties; cass. req., 29th March 1938, S. 1938, 1, 380; D.P. 1939, 1, 5, note Voirin: an offer for the exclusive advantage of the offeree may be accepted by silence.

[59] Article 1156: *"On doit dans les conventions rechercher quelle a été la comune intention des parties contractantes, plutôt que de s'arrêter au sens littéral des termes."* [The common intention of the contracting parties must be sought rather than to stop at the literal sense of them.]

de Cassation has developed the doctrine of *clauses claires et précises* by which lower courts are prohibited from having recourse to or inquiring into subjective or real intent of parties to a contract where the meaning is plain and unambiguous.

3 Pre-contract and Letters of Intent

A frequently arising category of business conclusions in the construction field cross the boundary from negotiation to contract, but themselves contemplate a further, or "the" contract. Separately, the pre-contractual stage may involve parties signifying in writing with varying degrees of formality that work, in a practical building sense, is to be set in motion or is under way; and letter of intent has its French equivalent, *lettre d'intention* .[60] An initial step reflecting a contemplation of a future contract it may be, but legal obligations may derive from it. The use of the term should more often be taken as a warning of pitfalls ahead,[61] rather than as descriptive of no obligation, for the perception that a pre-contractual act is without effect may prove deceptive.[62]

Ambiguity and uncertainty surround letters of intent both because of the aspirations or otherwise of the parties to them, whether conscious or not, and because they lie in an unclear grey zone.[63] Whatever the legal process may make of them, they have a practical use where morally binding commitments are sufficient, and with increasingly complex documentation in the construction industry their continued use is inevitable.[64]

Where descriptive of an intent to enter a transaction the potential

[60] As also the Italian, *lettera d'intenti* , and Spanish, *carta de intención*. There are other pre-contractual names, the French *protocol d'accord* , and the Italian *accudo di principio* . German speakers appear to have adopted the English phrase.

[61] Fontaine: Les Lettres d'intention dans la négotiation des contrats internationaux. Droit et Practique du Commerce Internationaux. (1977) vol. 3, 73, where the term is picturesquely cited as "Anarchie terminologique" because of the frequency that parties are taken to have contractual obligations whilst using the term.

[62] Notwithstanding that "mere letter of intent" may be used in England as terminology to describe a document found not to be a contract; as in Snelling v Snelling (1972). 1 All E.R. 79.

[63] M. Lutter, Der Letter of Intent (1982), "Grave Zone des Ungeklarten."

[64] There may also be a need for an assurance letter of intent for use by the potential contracting parties for their own internal or third party use; where approvals are required or where those making dependent arrangements such as lenders may be unwilling to make a commitment without written assurance that the parties are near agreement. Equally a party to the negotiations may receive supposedly non-obligatory pre-contractual documents as an assurance.

contracting parties may be assured by such a letter that they have stopped talking to others so as to give an added element of intent within the negotiations.[65] Comfort letters may also be given as, hopefully, substitutes for guarantees and they too have their French, *declarations de patronage*, and German, *patronatserk larungen* , equivalents. These may contain an expression of intent, such as for future funding, but of moral obligation, albeit that they may to the contrary be found to contain legal obligations;[66] and in France *declarations de patronage* are likely to be regarded as contractual in nature.[67]

At common law a letter of intent is capable of generating a contract, whether unilateral or synallagmatic, and it is a question of construction whether such letter is intended to constitute a legally binding undertaking on being accepted, or is a mere prelude to agreement on terms to be negotiated and settled by some other document. A letter of intent will ordinarily express an intention to enter into a contract at some future time, without creating any liability in respect of that contract. It may however give rise to the imposition of liabilities in the event of the intended contract not materialising, whether by way of executory contract or an obligation to remunerate if a performance, usually contemplated as of an interim nature,[68] be carried out.[69] This liability may arise in contract,[70] or "in quasi-contract, or,

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[65] Where amounting to a 'lock-out' agreement preventing the other party to negotiations from communication with third parties it represents an enforceable agreement, at least to that extent; Pitt v PHH Asset Management Ltd. (1993) 4 All E.R. 961; B. J. Davenport , Lock-out Agreements. (1991) 107 L.Q.R. 366.

[66] In Kleinwort Benson Ltd. v Malysia Mining Corp. Ltd. (1988) 1 W.L.R. 799, Hirst J. considered that such a letter constituted a firm undertaking giving rise to a contract, despite the fact that the parent had previously declined to give a guarantee and the effect of treating the letter of comfort as a binding undertaking was to make the defendants' liability greater than it would have been under the guarantee. The Court of Appeal, (1989) 1 W.L.R. 379, reversed the decision holding that in the circumstances the intent was a moral responsibility only. The letter given by the parent company to the bank proposing to lend money to the subsidiary stated that it was the parent company's policy to ensure that its subsidiaries were at all times in a position to meet the liabilities.

[67] Fontaine: Les Lettres d'intention dans la négotiation des contrats internationaux, 1977, 3 Droit et Pratique du Commerce International, 90.

[68] Arbiter Investments Ltd. v Wiltshier (London) Ltd. (1987) 14 Constr. L.R.16, (reported only in relation to a condition for a bond). The parties were found not to have contracted, and thus had proceeded on a letter of intent throughout a substantial part of the works and to a conclusion by a purported determination. The facts in Monk Constuction Ltd. v Norwich Union Life Insurance Society (1992) 62 B.L.R. 107 (C.A.) the entire works were completed with the parties, as found, having failed to conclude their entire contract, and without the proposed level of remuneration for the contemplated initial period ("proven costs") being found to have been duly accepted or applicable to the whole works.

[69] A review on the subjectis in, S.N. Bell, Work Carried Out in Pursuance of Letters of Intent: Contractor Restitution? (1983) 99 L.Q.R. 572.

[70] Turriff Constrution Ltd. v Regalia Knitting Mills Ltd. (1971) 9 B.L.R. 20.

as we now say, restitution".[71] The conclusion of the intended contract will normally govern the rights and the liabilities of the parties with retrospective effect, so replacing and ending any effects of the letter of intent.[72]

Some letters of intent may contain virtually all the material terms and record agreement on them, providing for a formal contract to be prepared. Equally, all material terms may be concluded but subject to conditions precedent, such as approvals, and the search then is to determine the extent to which the approval is more than an immaterial stamp to an existing agreement. In civil law these are characterised as contracts stated by the parties to become operative only when one of them has performed one of its obligations under the contract. In France, Article 1174 renders an obligation void if it is conditional on a *condition potestative* being a condition the fulfilment of which is wholly dependent on the will of the party who benefits from it.[73]

The phrase, conditional contract, may have any one of at least three different meanings in English law.[74] It may refer to a fact or event the occurrence of which is to be a prerequisite of the very existence of the contract, so that unless and until the condition is fulfilled the contract does not come into existence at all and until then either side is free to withdraw from the transaction. Alternatively the phrase may denote an existing contract under which the duty of performance by one or both parties is suspended until the condition is fulfilled. Here there is a legal relationship between the parties, so that neither may obstruct the performance of the condition or withdraw from the transaction before it is clear that the condition will not be met within the time stipulated; and the sole effect of the condition is to suspend

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[71] British Steel Corp. v Cleveland Bridge & Engineering Co. (1983) 24 B.L.R. 94 at 122.

[72] G. Percy Trentham Ltd. v Archital Luxfer Ltd and others (1993) 1 Lloyd's Rep. 25 (C.A.), "... in this fully executed transaction a contract came into existence during performance even if it cannot be precisely analysed in terms of offer and acceptance. The conclusion must be that when the contract came into existence it impliedly governed pre-contractual performance" per Steyn L.J.. The view that the existence of a contract finally made justifies the retrospective application of contractual liability was expressed by the German jurist R. von Jering, Culpa in Contrahendo, 1861, (referred to also under Obligations arising During Contract Formation) but it has not been followed in the French courts; Cass. civ. 1, 24th November 1965 Bull. I no. 651, p. 495; JCP 1966 II., 14602, obs. Ch. Gaury, Rev. trim dr. civ. 1966, 310, obs. G. Cornu; and Cass. com. 27th April 1968 Bull IV No. 141 P. 124, JCP 1968 IV 95.

[73] B. Nicholas, French Law of Contract (1992). Article 1174: "Toute obligation est nulle lorsqu'elle a été contractée sous une condition potestive de la part de celui qui s'oblige." [Any obligation is void when it has been contracted under a *condition potestive* on the part of the party who obligates himself]. But the effect is not the same in Italy, or all other countries based on the Code Civil.

[74] G.H. Treitel, The Law of Contract (8h edn.), p. 48 f.

the duty to perform. The third type of conditional contract is one in which the condition is not suspensive but resolutive, that is, the contract has immediate force but comes to an end if the condition is not fulfilled by the stated time. Conditions of the second and third category are more common than those of the first, and in the building field may represent a dependency for example on a planning or building regulation permission.

Without a neat compartment in either civil law or common law there is no specific set of rules into which letters of intent fit, and they straddle the boundaries of contract.[75] The general approach of the civil law remains one of denying legal effect to working documents exchanged during negotiation, and derives from the concept of the *droit commun* of pre-contractual instruments known as *punctuatio* having no relevance, at least until agreement has been reached on all essential elements. There is no separate classification in either system and the task is to determine on which side of a boundary any given set of circumstances falls. The formation of a contract is very much an event in common law eyes, as the culmination of the bargaining, but to a civil lawyer the contract appears more an expression of agreement and a relationship than a bargained-for exchange. This appears from a comparison of the JCT and AFNOR conditions of building contract - it is easy for a common lawyer to point to the start of the rights and duties highlighted by the formal parts in the JCT form, (the "Agreement"), but a similar clear-cut approach cannot be adopted towards the AFNOR terms, and the necessity arises to adopt a civil law understanding of the notion of contract formation as a continuum or process rather than as an event.[76]

In French law, pre-contractual agreements are more readily considered as being of a binding nature. This may be explained by three factors: first, contract law is dominated by the idea that agreement, and not consideration,

[75] This is not surprising in view of the origins of the rules of contract and their development involved transactions, particularly sales, without long term obligations or lengthy negotiations, so that the rules as to the application of contractual obligations were adequate at an earlier stage of economic life for the determination of whether and when a contract was made. However in civil law systems the application of the principle of good faith, and the doctrine of *culpa in contrahendo*, has been available as imposing an overall requirement of negotiation in good faith, whether giving rise to a contractual obligation as in Germany or a liability in tort as in France, Italy and the Netherlands.

[76] This is also reflected by the courts in civil law countries being more likely to find parties having entered into contractual relations at an earlier stage than under common law. The AFNOR conditions make provision for the preparation of documents the lack of which would in England give rise to argument whether a contract had been concluded.

is necessary and sufficient to make a contract, second, French courts are seemingly not very demanding as to the proof of existence of a contract. As a consequence, a precontract, *avant contrat* , exists whenever there is proof of an agreement relating to precise obligations. Thirdly, contractual obligations may relate to any subject, not contrary to public order, including an undertaking with regard to the time during which an offer will remain open for acceptance.[77]

The French concept of *cause* is a broader spectrum than the notion of consideration, and may consist not only of past services received, but of any economic interest, or even a moral interest of the debtor, so that promises to conclude a contract or to negotiate a contract are binding.[78] The determination of the consequences of letters of intent, memoranda of common understandings, or other pre-contractual document is based on these principles, and any such document may be evidence of a precontract, if it is written in terms clear enough to show an intention to be bound by a precise obligation. Conflicts may appear between the expressed and the real intention. If the expressed intention is unclear, it is interpreted to discover the real intention which is, in principle, the only source of contractual obligations under French law, but even here the declared intention will bind if it has been understood as such by the recipient.[79]

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[77] The concept of the preliminary contract was identified by the *Cour de Cassation* in a case of withdrawal by a sub-contractor of his offer because of an error in calculation prior to its acceptance and when it had been used as the basis for a successful tender. The court held that an offer is binding when it gives rise to an unarguable accord, whether express or implied, that it has been made so as to remain in force for an identifiable period, *" dès lors qu'il résulte d'un accord exprès ou tacite, mais indiscutable, qu'elle a été formulée pour être maintenue pendant un délai déterminé"*, but found that in the particular case no such accord existed: when the sub-contractor made his offer it was not known that it would be used as a basis for making a tender, Colmar, 4th February 1936, D.H. 1936, 187.

[78] For instance, in an option contract, *promesse unilatérale de contrat*, the *cause* of the beneficiary's obligation to pay a price to the promissor consists in his interest in concluding the future contract, Cass. com., 23rd June 1958, D. 1958, 581, note Malaurie; J.C.P. 1958. II. 10857, note P.E. A particular example is the acknowledgement by *Cour de Cassation* of a precontract relating to the constitution of a corporation. Evidence was brought through a meeting minute that the parties had agreed on the object of the future corporation, on the importance and nature of the shares of capital and on the director's remuneration. The court decided that such an agreement "succeeded the stage of mere negotiations" and was a promise to constitute a corporation, *promesse de société* , and refusal to participate in the constitution of the corporation amounted to a breach of such promise; Cass. com. 28th April 1987, Bull. IV. n. 104.

[79] This is illustrated in the decision of the *Cour de Cassation* that an offer to renew a contract could result from the following letter: "We have the pleasure to propose to you a new contract of grant (*concession commerciale*) for 1975, the detailed provisions of which will be announced to you before the end of this year." The recipient argued that he understood the letter as expressing the intention to renew the contract under the same conditions as for the previous year; the sender offered proof that his real intention was to propose a new contract under different conditions. The court considered that the recipient "was entitled to rely on the terms of the letter." Cass. com. 9th February 1981, D. 1981, p.4, note J. Schmidt.

The legal force of a letter of intent inevitably depends on the precision of its wording. If the letter contains expressions such as "we have the intention to be engaged", *avoir l'intention de s'engager*, they are interpreted as expressing intention to be bound by contractual obligation. Contrary to the common law position as seen in the *Kleinwort Benson* decision on appeal,[80] this is the case with letters written by a parent company to its subsidiary's bank, *lettres de confort*, in order to reinforce the parent's obligation to guarantee the subsidiary's debt.[81] There are few cases in civil law countries bearing on the effect of letters of intent, but, interestingly, the Italian *SME* case concerned a written expression of mutual understandings which made reference to approvals and authorisations but not to any subsequent agreement.[82] On a claim for breach of a contract the issue of real intent to bind, or, to negate that by necessity for a subsequent declaration of will, was decided in favour of the latter on the basis of the negative intent behind the requirement for authorisation, while the failure to secure it did not render the potential vendor liable for fault in negotiating.[83]

In England the effect of remaining an agreement to agree future terms is that "if the execution of a further contract is a condition or term of the bargain"[84] it will fail on the basis of the law not recognising a contract to enter into a contract.[85] Equally the court will not enforce a contract to negotiate, on which side, and not saved by reference to a reasonable price,[86] or to any available

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80 Kleinwort Benson Ltd. v Malysia Mining Corp. Ltd. (1989) 1 W.L.R. 379 (C.A.).

81 Cass. com. 21st December 1987, J.C.P. 1988.II.2113, concl. Montanier.

82 Buitoni S.p.a. v Istituto per la Ricostruzione Industriale The decision of the Rome Tribunal: judgment of 19th July 1986, Trib. Rome, 1 Foro It. 2284 (1986); the decision of the Court of Appeals: judgment of 9th March 1987, 1 Foro It. 1260 (1987); the Judgment of the Corte di Cassazione: judgment of 11th July 1988, 1 Foro It. 2584 (1988).

83 Studied in Lake and Draetta, Letters of Intent and other Precontractual Documents.

84 Von Hatzfeldt - Wildenburg v Alexander (1924) 1 Ch. 97.

85 Unless saved by an implication of reasonableness, and to overcome the absence of machinery for the resolution of the absent element; for example in Beer v Bowden (1981)1 W.L.R. 522 (C.A.) and Sudbrook Trading Estate Ltd. v Eggleton (1983) A.C. 444 (H.L.).

86 The Sale of Goods Act 1979, section 8 (2) provides that if no price is agreed a reasonable price must be paid, this is on the basis that there is a contract of sale, but must equally the result in the finding of a contract which but for price agreement would not constitute one.

third party decision, fell *Courtney and Fairbairn v Tolaini*.[87]

The basis for finding no enforceable agreement was the term to negotiate, for:

> "If the law does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed) ... it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have binding force. No court could estimate the damages because no one can tell whether the negotiations would be successful or would fall through: or if successful, what the result would be. ... a contract to negotiate, like a contract to enter into a contract, is not known to the law." [88]

The court was not willing to supply the deficiency of resolution in the event of any failure to agree fair and reasonable sums. It simply did not permit of a result that required such resolution.[89] There the parties had not progressed under the agreement to the extent of permitting or commencing work. This feature had an acknowledged influence in *Sykes v Fine Fare*,[90] where it was present alongside the important arbitration provision as to "the meaning of or effect of this Agreement or as regards the performance by either party of their obligations hereunder or in relation to any matters incidental thereto ...".[91]

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[87] Courtney & Fairbairn Ltd. v Tolaini Bros (Hotels) Ltd (1975) 1 W.L.R. 297 (C.A.), where the plaintiff contractors made an agreement by exchange of letters that the contractor would secure finance for the defendant developers in return for their promise to execute a building contract to give the contractor work on several sites in the area. The important concluding words were: "Accordingly, I would be very happy to know that, if my discussions and arrangements with interested parties lead to an introductory meeting, which in turn leads to a financial arrangement acceptable to both parties, you will be prepared to instruct your Quantity Surveyor to negotiate fair and reasonable sums." The decision was followed in Mallozzi v Carapelli S.p.A. (1976) 1 Lloyd's Rep. 407 (C.A.), and approved in Walford v Miles (1992) 2 A.C. 128 (H.L.).

[88] Lord Denning at page 301, expressly overruling dicta in Hilas & Co. v Arcos Ltd. (1932) 147 L.T. 503. In any event the appropriate remedy may not be damages for lost expectation under a prospective ultimate agreement, but rather damages caused by the injured party's reliance, just as under a lock-out agreement which is enforceable.

[89] The result followed May & Butcher v The King (1934) 2 K.B. 17, where a contract with terms providing for agreements at future dates and without a mechanism in default of agreement, was thus incomplete and nugatory. The International Chamber of Commerce has promulgated rules for the regulation of contractual relations that provide for the appointment of a third person whose task it is to complete an incomplete agreement by either a recommendation or a binding decision, as the parties have provided, Adaptation of Contracts ICC publication, No. 326, 1978.

[90] F. & G. Sykes (Wessex) Ltd. v Fine Fare Ltd. (1966) 2 Lloyd's Rep. 58.

[91] A more recent approach to terms requiring future agreements is in Didymi Corp. v Atlantic Lines and Navigation Co. (1988) 2 Lloyd's Rep. 108, (C.A.), where a charterparty's price adjustment clause providing for an "equitable" reduction in price "to be mutually agreed ... but in any case no more than that required to indemnify the Charterers" was determined not to be a mere agreement to agree. It was categorised as a procedure for calculation of the amount of the indemnity, and so "machinery", with "equitable" to be applied as "fairly and reasonably". The Courtney decision was rightly distinguished it is suggested, as being concerned with a contract in which more, and more significant, terms were undetermined; but again Courtney differed in its lack of any commencement of the contemplated performance.

Where parties have negated the conclusion of a contract in their documentation pending execution of the formal contract, whether by "subject to contract" or other words showing that further matters or negotiations are contemplated, it may be taken that the English courts will respect their intention.[92] Against this, if the supposedly pre-contractual instrument contains the terms of the complete agreement save for the formality of execution then the necessity for the subsequent contract is treated as a formality representing the record of the already concluded agreement.[93] The matter is one of construction of the particular terms to determine objectively the parties' intention as to whether the production of the formal document is a condition of the bargain or merely an expression of desire as to the manner in which the agreed transaction will be recorded.[94]

In France an agreement to make a contract, *promesse de contrat* or *premesse synallagmatique de contrat* , is an agreement by which a party commits itself to enter a contract on the terms of the *premesse de contrat* if the other party manifests in appropriate form an intention to be bound. This savours of an option, but it is a bilateral or multilateral agreement. There is a separate concept in the precontract, *avant contrat*, and although the term has been criticised as imprecise and not capable of describing any kind of preliminary agreement in negotiations,[95] it actually encompasses those agreements reached in negotiations that are binding on the parties, but which require to be complemented by agreement on other elements. Its function is that it provides the basis upon which Article 1135 may be invoked to resolve

[92] Chillingworth v Esche (1924) 1 Ch. 97; and Tiverton Estates Ltd. v Wearwell Ltd. (1975) Ch. 146, "I cannot myself see any difference between a writing which (I) denies there was any contract; (II) does not admit there was any contract; (III) says that the parties are in negotiation; or (iv) says that there was an agreement "subject to contract" for that comes to the same thing."

[93] Rossiter v Miller (1878) 3 App. Cas. 1124 (H.L.); Lewis v Brass (1877) 3 Q.B.D. 667 (C.A.). In Okura & Co. v Navarra Shipping Corp. S.A. (1982) 2 Lloyd's Rep. 537 where documents contained the essential terms of an agreement, the stipulation "to be incorporated in a memorandum of agreement in a mutually acceptable manner" prevented enforcement. although the parties were found to have intended further agreements to which those words looked. The context of an oral performance guarantee to be confirmed in writing, being part of a larger undisputed oral agreement, assisted the conclusion that the guarantee however, complete in its terms but contemplating reduction to writing, was enforceable, as explained in Clipper Maritime Ltd. v Shipstar Container Transport Ltd. ("The Anenome") (1987) 1 Lloyd's Rep. 546.

[94] Von Hazfeldt - Wildenburg v Alexander (1924) 1 Ch. 97. For example, in J.H.Milner & Son Ltd. v Percy Bilton Ltd. (1966) 2 All E.R. 894 the use of the word "understanding" has been found to constitute a purposeful ambiguity of expression implying that a letter of intent was to be a gentleman's agreement only and not a final contract.

[95] G. Ripert andJ. Boulanger, Traité de Droit Civil, 2, 144.

those elements not agreed.[96]

Consistent with civil law understanding of the contract as a relationship, French law presumes that the execution of the formal contract is not the event that creates the contractual rights and obligations,[97] rather that it exists from the time of the perceived agreement. A clearly expressed intention to create a condition whereby the rights and obligations are subject to a formal contract would be upheld,[98] although there appears no direct equivalent of the phrase subject to contract. The broader question is how and whether a person may express an intention not to contract. If a party states during the pre-contractual process that he does not wish to undertake a contractual obligation, such a statement prevents the formation of a contract,[99] but an expressed wish to undertake only a moral obligation without being legally bound does not prevent a contractual obligation as to this where the terms are clear and precise.[100]

The term 'subject to contract' may be comparable in France to clauses looking towards a subsequent agreement, *accord ultérieur* , on some elements of the contract. Such clauses are effective in the sense that the definitive contract will be formed only upon the definitive agreement for which the parties have to consider those elements as essential for the conclusion of the contract.[101]

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[96] Article 1135. *"Les Conventions obligent non seulement à ce qui y est exprimé, mais encore à toutes les suites que l'equité, l'usage ou la loi donnent à l'obligation d'aprés sa nature"*. [Agreements are binding not only in respect of what is expressed, but also as to all matters which equity, usage or law attach to the obligation according to its nature.]

[97] de Moor, Contract and Agreement in English and French law. (1986) Oxford J.L. Studies 6, 275.

[98] R. Schlesinger, Formation of Contracts, 1968.

[99] For example a client of a night club hung her coat on a hanger above which a sign read: "We do not accept to become a depositary of the clothes". The court decided that no contract was formed and the owner was not liable for its theft; Cass. civ. 1, 1st March 1988 Bull. 1. n. 57.

[100] Cass. civ. 2, 27th November 1985, Bull. II. n. 178; Rev. tr. dr. civ. 1986, 749, obs. Mestre.

[101] Cass. com. 11th February 1980, Bull. IV. n. 71. Unlike in France the Italian *Codice Civile* provides for the *contratto prelimiare*, or *precontratto*, where the parties commit themselves to conclude another contract a *contratto definitivo* within a given time. For the *contratto prelimiare* to be binding, the terms of the *contratto definitivo* must be identified in it. They do not become effective until the execution of the *contratto definitivo* but such execution is a legal obligation, breach of which may be remedied by an order for its specific performance. The *contratto preliminare* represents a binding commitment not merely an element of the phase of formation of the terms of the contract. Gabrielli, Il Contratto Preliminare, 1970, Sacco, La Preparazione del Contratto, 1982. As a pre-contractual document the *minuta*, comprising a draft document covering points already discussed or under discussion, is not of binding effect or enforceable and appears the closest Italian equivalent to a letter of intent.

Whilst the premise exists in French law as to revocability of offers at any time prior to the formation of the contract,[102] the concept of *culpa in contrahendo* , fault in negotiating, in practce affects it. An obligation of good faith is applied to the conduct of contract negotiations,[103] so exerting the pressure of potential challenge when the legal right to revoke is exercised in circumstances transgressing the obligation.

Pre-contractual relations and liability are important subjects for the construction industry, not least because projects in the majority of cases require thorough and as a result time-consuming and expensive preparations. Before sensible offers or tenders can be submitted designs and drawings have to be available both for realistic estimates of price and to identify the conditions applicable to the works.[104] Two linked aspects warrant attention, namely, whether costs of preparation of offers or tenders under certain conditions justify compensation by the prospective employer, and, whether and to what extent obligations attach if pre-contractual negotiations have reached a certain stage.

Culpa in contrahendo is not a true exception to the premise of revocability of an offer nor is it limited to revocation. It is a distinct principle applicable to that dawn zone prior to contract formation. By its application the commercial effect may well be to render withdrawal uneconomic or unpalatable, and in this sense only it impacts on revocability, for civil law has been willing to impose pre-contractual liability based on what may be seen as an obligation of perceived fair dealing. So, a withdrawal of an offer in bad faith entitles the offeree in Italy to reliance damages, *interesse negativi* , the reimbursement of expenses incurred during the pre-contractual phase of a contract not concluded, and loss arising from missed opportunities in

[102] This premise does not apply to Germany and its legal family.

[103] Italian Codice Civile Article 1337 "The parties, in the conduct of negotiations and the formation of the contract, shall conduct themselves according to good faith," Trans. Bertrams, Lingo and Merryman.

[104] Detailed ground investigations may be necessary, or complicated technical work with analysis of design criteria. The French tradition of seeking tenders on sketch drawings frequently places a requirement on contractors to effect design work as a necessary part of submitting a tender.

consequence. Further, in circumstances where an offeree has begun performance in good faith, before notice of revocation an offeror is liable for expenses and losses incurred as a consequence of the commencement of performance.[105]

The German jurist Jhering advanced the thesis that parties to precontractual negotiations are contractually bound to observe the "necessary *diligentia*". A party who commits a breach of this contractual obligation, a *culpa in contrahendo* , becomes liable for damages measured by reliance.[106] Jhering concerned himself primarily with problems such as the effect of *culpa* on contracts concluded by mistake rather than failed negotiations, but the French scholar, Saleilles advanced the view that after parties have entered into negotiations, both must act in good faith and neither can break off the negotiations arbitrarily without compensating the other for reliance damages.[107]

German courts have relied on Jhering's thesis as a basis of pre-contractual liability in the formulation that "a fault in contractual negotiations that renders one liable for damages can also exist in that one party awakes in the other confidence in the imminent coming into existence of a contract - subsequently not concluded - and thus causes the latter party to incur expenses."[108]

In France it is not the negotiations themselves that create obligations for the purposes of liability, but their interruption may result in such, particularly, but not exclusively, where wilful misconduct or gross negligence exists.[109] Obligations do however arise upon promises to contract *promess de contrat*

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[105] Italian Codice Civile, Article 1328.

[106] R. von Jhering, Culpa in Contrahendo, Privatrechts 1, 1861; (De la culpa in contrahendo, tr. Meulenaere). On Jhering's analysis, a party who could avoid a contract for a mistake due to lack of diligence should compensate the other party for loss resulting from a change of position in reliance on the validity of the contract.

[107] Raymond Saleilles, De la responsabilité précontractuelle, 6 Rev. Trim. Dr Civ. 697, 718-19, 722, 1907.

[108] The court continued: ["the mere breaking off of negotiations by one party does not, without more, constitute a fault in contract negotiations... Either of the parties can create or strengthen in the other party, simply by the fact that he participates in such negotiations, the more or less certain assumption that he is ready to contract. But this alone does not reduce his freedom of decision respecting the conclusion of the contract and does not yet render him... liable, if he breaks off negotiations."], 6th February 1969, Bundesgerichtshof, West Germany, Nachschlagewerk des Bundesgerichtshofs, BGB 276, no. 28 (1969).

[109] *Faute intentionelle ou lourde*, Cas. req. 11th June 1925.

and precontracts, *avant contrats* . There has been a similar development of reasoning as in Germany, although such pre-contractual liability is imposed not for breach of a contractual obligation but as a civil wrong, *delit*.[110] The wrong is viewed as an abuse of right, *abus de droit* , for which bad faith without malice will suffice.[111] Bad faith may exist not only where a party negotiates with no serious intention of contracting,[112] but also where a party breaks off negotiations abruptly and without justification. For example, a French businessman negotiated for the purchase of an American machine for the manufacture of cement pipes from the exclusive distributor in France. After the prospective buyer had travelled to the United States to see the machine, and prolonged and advanced negotiations, the distributor broke off negotiations abruptly, *brutalement* , and "without legitimate reason", refusing to sell to the prospective buyer. The *Cour de Cassation* affirmed that the distributor was liable for the cost of preparations made by the prospective buyer on the ground that there had been an "abusive rupture" of the negotiations.[113] French courts are not frequently asked to find an obligation of fair dealing arising out of negotiations to a point where one of the parties had relied on a successful outcome. It seems that the potentially generous measure of precontractual liability for lost opportunity is not widely appreciated, or perhaps the desire for future business restrains pursuit.

The affirmation in England in *Walford v Miles* , that a bare agreement to

[110] J. Ghestin, Traité de droit civil ii: Les Obligations: Le Contrat: formation, 228, 2nd. ed. 1988. J. G. Viney, Traité de droit civil, 196-200, 1982, discussing precontractual liability in French law. It is suggested that German courts are willing to impose liability where a party has conducted himself in such a fashion that the other party could, and did, justifiably count on a contract with the negotiated content coming into existence and then refuses to contract without an appropriate ground; Mazeaud & Tunc, Traité théorique et pratique de la responsabilieté civile délictuelle et contractuelle, 116-21, 6th ed, 1965; P. Durry, La nature contractuelle ou délictuelle de la responsabilité, 7 Rev. Trim. Dr. civ. 779, 779-80, 1972.

[111] Judgment of 8th July 1929, Cour d'appel, Rennes, Fr., 1929 Recueil Périodique Hebdomadaire de Jurisprudence 548.

[112] Judgment of 20th March 1972, Cass. civ. com., Fr., (1972) Bull. civ. iv no. 93. The basis on which damages were calculated is obscure. The unpublished opinion of the Court of Appeal of Colmar, Judgment of 13th July 1970, cour d'appel, Colmar, Fr., indicates that the defendant claimed that the expenses of the plaintiff's trip to the United States were paid by the American firm but that the plaintiff claimed its costs in constructing a shed. The award of 7,500 French francs was not explained. It may be that damages were based on the loss of a chance.

[113] In an interesting Dutch case, the Hoge Raad der Nederlanden went beyond this. It ruled that if negotiations had progressed so far that the parties reasonably could assume that a contract would be concluded, damages could include profits that would have been made had the contract been concluded. It also ruled that even before the negotiations had progressed this far, a disappointed party might be able to recover expenses incurred in negotiating. Judgment of 18th June 1982, Hoge Raad der Nederlanden, Neth., 1983, NJ, no. 723. J. J. Goudsmit, Construction Contracts, in The Dossiers of the Institute of International Business Law and Practice, ICC, 1990.

negotiate cannot constitute a legally enforceable contract, was based on uncertainty; tested there against time and grounds for terminating negotiations. The conclusion was that "a duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party",[114] which inevitably follows from a presupposition of no duty on a negotiating party. There is justification for judicial opposition to an obligation of fair dealing on parties to pre-contractual negotiations. Although it is in society's interest to provide a regime under which the parties are free to negotiate contracts, the outcome of any particular negotiation is not ordinarily a matter for interference.[115] Further, it was considered that there was no established reason to believe that imposition of a general obligation of fair dealing would improve the regime under which such negotiations take place.[116] Determining when in negotiations an obligation of fair dealing arises might have an undesirable chilling effect, discouraging parties from entering into negotiations if chances of success were slight. The obligation might also have an undesirable accelerating effect, increasing the pressure on parties to bring negotiations to a final, if hasty, conclusion.

As long as no contract has been concluded, damages may be compensated only in tort. This is an established premise of French law.[117] There are no specific conditions of liability relating to the pre-contractual process. As a consequence, the negotiator who suffers damage which he ascribes to another negotiator's behaviour during the negotiations, must bring evidence that all the requirements for liability in tort are present: compensatable damage, fault, and a causal relation between them. The damage may consist of loss of time and money spent towards concluding the contract, in the loss of economic value of a confidential information used or disclosed by the other party after the end of negotiations, or in any other present loss, *damnum*

[114] Walford v Miles (1992) 2 A.C. 128 (H.L.) at 138.

[115] "How can a court be expected to decide whether, *subjectively*, a proper reason existed for the termination of negotiations?", Walford v Miles, Lord Ackner at 138.

[116] "The concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations", Walford v Miles, Lord Ackner at 138. E. Peel, Locking out and Locking in: the enforceability of agreements to negotiate. (1992) C.L.J. 211.

[117] Cass. com. 20th March 1972: Bull. IV. n. 93; J.C.P. 1973, 17543, note J. Schmidt; Rev. tr. dr. civ., 1972, p. 779, n.1. obs. Durry; cass. com. 11th January 1984: Bull. IV. n. 16.

emergens , or missed gain, *lucrum cessans*.[118]

The requirement of certainty of the compensable damage sets limits on the compensation of missed benefits. Pre-contractual negotiations may not be considered as leading certainly to the conclusion of the contract; accordingly, breach of negotiations entails a loss of a chance, *perte d'une chance* , to conclude the contract and receive its benefits which is compensable. Such damage is considered as a question of fact,[119] which effectively leaves the decision in the particular circumstances to the *juge du fond* , and without any ordinary prospect of interference or guidance from the *Cour de Cassation* .[120]

Pre-contractual Default

With precontractual liability considered in France under the rules of tort, the fault must be subsumed under the general definition of wrongful behaviour "which would not have been committed by a reasonable man under the same circumstances.",[121] and it is not necessary to show either an intentional or a serious wrongdoing. French courts do however remain cautious in acknowledging pre-contractual wrong in order not to hamper freedom in business. The similarity of sentiment as in *Walford v Miles* was apparent in dismissing an action for damages on the grounds that "it would amount to a serious injury towards individual freedom and business security if one could easily be liable for breach of negotiations and dealing with a competitor; the pre-contractual fault must, in other words, be obvious and undisputable.", rather than in nullifying the principle.[122]

As a test, a reasonable man's behaviour would consist of loyalty and good

[118] Precontractual fault may entail damage which appears only after the conclusion of the contract. This would be so when the contract has been concluded in spite, or because, of wrong or insufficient information given during the negotiations. In such cases, the question of pre-contractual liability is associated with the question of damages for misinformation or nullity of the contract.

[119] This is not specific to the pre-contractual damage, and applies to all compensation in tort.

[120] This renders it difficult to analyse compensation under French law, and it is additionally so because the judges do not ordinarily make explicit the elements on which they assess compensation. Ordinarily, the plaintiff is awarded a lump sum on the basis of a statement such as "the Court has sufficient elements to evaluate the damage to the amount of ...".

[121] B. Starck, Droit civil. Obligations: Responsabilité délictuelle, H. Roland and L. Boyer eds. 3rd ed. 1988 , n. 265, p.150.

[122] Pau, 14th January 1969, D. 1969, 716.

faith in negotiating; conversely bad faith and lack of loyalty are labels of pre-contractual wrongful behaviour. In practice, bad faith may consist of any behaviour that impeaches the other party's confidence, such as breaking off negotiations when the other party could reasonably expect the contract to be concluded,[123] refusal to renew a contract when the other party could reasonably rely on a promise to renew,[124] disclosure of confidential information,[125] or erroneous information given about the the elements of the negotiated contract.

When wrongful intent, *dol*, is shown, misinformation is a fraud with the sanction of the avoidance of the contract under Article 1116.[126] Lacking such proof, misinformation may be regarded as a breach of a contractual obligation, with examples in the warranty against latent defects, the obligation to deliver merchandise conforming with contractual provisions, or an obligation to inform about the conditions of use of the merchandise, and the scope of such obligations is wider for a professional dealing with a consumer.[127]

In this respect, the French courts consider the parties' knowledge as to the required information. If the recipient of the information is a professional, he has the duty to seek information himself about the elements of the contract. In negotiations between car manufacturer and dealer, the former had shown to the latter a business forecast of a numerical annual sale of cars, but in fact the dealer was able to sell only about one-third due to the market decline. The dealer claimed damages in tort under Articles 1382 and 1383 from the manufacturer against whom he alleged wrongful misinformation, and on his case the manufacturer had all the available economic information and should have foreseen the shortfall. The action was dismissed on the grounds

[123] Cass. civ. com., 20th Mar.ch 1972, Fr., (1972) Bull. civ. iv no. 93.

[124] Cass. com., 9th February 1981, D. 1981, p. 4, note J. Schmidt.

[125] Cass. com., 3rd October 1978, d. 1980, 55, note J. Schmidt.

[126] Article 1116: " *Le dol est un cause de nullitee de la convention lorsque les manoeuvres pratiquées par l'une des parties sont telles, qu'il est évident que, sans ces manoeuvres, l'autre partie n'aurait pas contracté.* " [Dol (fraud) isa cause of nullity of the agreement when the artifices practised by on party are such that it is evident that without them the other party would not have contracted.]

[127] He is treated as if he were aware of the defects, J. Ghestin, op. cit. s. 476. If these contractual obligations against which misinformation is tested are not applicable then damage caused by misinformation may be compensated in tort, with negligent misinformation considered as a fault; Cass. com., 24th November 1973, Bull. IV. n. 370. J. Huet, Responsabilié contractuelle et responsabilié délictuelle, (1978).

that the dealer himself was a professional and could have procured information to check "the seriousness of the forecast made".[128] The approach is strikingly similar to that in *Esso v Mardon* [129] where the respective positions of the parties determined the court's attitude to the reliance placed, although on the facts the claim succeeded.

Causation is material in the approach of French law in this area. Where a party has broken off the negotiations it is sometimes argued that the breach was caused by the other negotiator's misbehaviour, and it is then necessary to analyse both parties' conduct in order to determine causation at the break in discussions. A party's precontractual fault does not necessary entail a breach of the negotiations by the other party, but it may for instance cause the conclusion of a less advantageous contract. If the breach has been caused by both parties' misbehaviour, then contribution is available.

The common law mechanism for recovery of expense in the area of performance effected either at the request of another or for his benefit in circumstances not amounting to contract, and giving rise to remuneration, is on the basis of a quantum meruit.[130] Equally, where the parties have dealings with each other on the footing that there is a valid contract when in fact their agreement is devoid of legal effect or becomes so because, for example, a party exercises his right to rescind or invokes a right to treat the contract as unenforceable, then the terms of the agreement cannot be enforced, but a party who has received a benefit under the contract or supposed contract, can be required to restore the benefit or its money value in a quasi-contractual claim for restitution.[131]

English contract law draws a sharp, although potentially unreal, distinction between negotiating statements that are intended to form part of the promise or bargain, and those which at the time they are made are not intended to be promissory in character but are merely made to induce the other party to

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[128] Cass. com., 25th February 1986, Bull. IV. n. 33; J.C.P. 1988. II.20995, note Virassamy; Rev. tr. dr. civ., 1987, 85, obs. Mestre.

[129] Esso Petroleum Co. Ltd. v Mardon (1976) Q.B. 801 (C.A.).

[130] William Lacey (Hounslow) Ltd. v Davis (1957)1 W.L.R. 932.

[131] P. Birks, An Introduction to the Law of Restitution.

enter into contract.[132] A statement of the latter kind is a mere representation, and the innocent party's remedy if it is false is not a claim for breach of contract but a claim for rescission of the contract and/or damages in tort for deceit or negligence or under the Misrepresentation Act 1967. Where a misrepresentation later becomes incorporated as a term of the contract, the innocent party has the option of treating it as a mere representation or a breach of contract.

In English law the opening of negotiations for an intended contract, even if none finally results, may impose liability in tort for fraudulent or negligent misstatements causing loss. Since such statements can attract liability under general principles of tort even if not made with a view to inducing a contract between the maker and recipient of the statement, the fact that they are a prelude to an intended contract which does not materialise is not seen as a barrier. The disclosure of confidential information solely for the purpose of an intended contract may be protected by imposing on the recipient of the information the duty to respect the confidence, and a breach of such duty is actionable, although the juridical basis of the claim remains obscure.[133]

Misrepresentation involves some positive misstatement, expressly or by conduct for the mere failure to disclose a material fact is not by itself sufficient, except under contracts *uberrimae fideii* .[134] However, active concealment of the facts, for example deliberately covering up defects in property, may constitute a misrepresentation, as may a failure to correct a statement which was true when made but subsequently becomes false as the result of supervening events prior to the contract.[135]

English law equates its position of freedom to withdraw from the proposed

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[132] The statement may not feature as a term of the contract, but is actionable as a misrepresentation which, whether innocent or fraudulent, entitles the buyer to rescind the contract and, unless it was made in the reasonable belief that it was true, also entitles him to damages.

[133] Having been based variously on equity, tort, contract and property; described generally, in the Law Commission Report, Breach of Confidence (Law Comm. No. 110, 1981). An example of a successful action for the misuse of information imparted in confidence during negotiations is Seager v Copydex Ltd. (1967) 2 All E.R. 415, followed in Fraser v Thames Television Ltd. (1983) 2 All E.R. 101.

[134] French jurisprudence appears to be evolving a principle of *réticence dolosive* , wrongful/fraudulent silence, and by reference to disclosure obligations imposed by legislative enactment, J. Ghestin op. cit. s. 462.

[135] This is because a representation is deemed to be continuously made up to the time of the contract, a principle now in section 2 (1) of the Misrepresntation Act 1967.

transaction until a contract has been concluded with no duty of good faith in negotiations, but where a contract is concluded the court may imply an agreement to negotiate further terms in good faith.[136] It is not easy to see why such an implied agreement, or an agreement to use best endeavours, should be any less open to the charge of uncertainty than an agreement to negotiate which is not based on an existing agreement. The mechanism of implication is available however because of the framework of the contract, which itself narrows the area in which to agree and renders it easier to find what the parties should have agreed.

The lack of a remedy for a party to negotiations where the other party breaks them off arbitrarily or prematurely flows partly from there being no halfway house between contract and no-contract as well as from the absence of the concept of *culpa in contrahendo* . It does not necessarily follow though, from the assumption of risks associated with withdrawal,[137] that a party to negotiations is completely immune from consequences of his conduct for there are forms of estoppel by which someone may be bound by his promise even where there is no contract.[138]

If someone invites a tender from another knowing that he will not in any circumstances accept that party's tender the latter may recover his abortive expenditure in an action in tort for deceit;[139] and if a party incurs fruitless expense in negotiations because the other party has deliberately or by negligence misled him as to the nature or terms of the proposed contract there seems no reason why he should not have a claim in tort for the recovery of his outlay. Further, where services are provided in expectation of a contract and go beyond what is normally to be expected of a negotiating part or are provided in the mistaken assumption by both parties that a contract was in existence or would be concluded the law may imply a promise on the part of the recipient to pay on a quantum meruit.[140]

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136 Donwin Productions Ltd. v EMI Films Ltd. (1984) Times L.R. 9th March 1984.

137 "To advance (his) ... interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope (of) ... improved terms", Walford v Miles, per Lord Ackner at 138.

138 Crabb v Arun District Council (1976) Ch. 179. There is also a potential liability of a party in tort where his statements are fraudulent or negligent and cause loss, and these tort principles are capable of being applied to the negotiating process itself.

139 Richardson v Sylvester (1873) L.R. 9 Q.B. 34.

140 William Lacey (Hounslow) Ltd v Davis (1957) 1 W.L.R. 932, where the authorities are reviewed.

It is only where a party's expectations are engendered improperly, or in such circumstances as give rise to an estoppel, that English law will allow a remedy for his reliance loss or allow him to treat a promise or other statement made to him as temporarily or permanently binding. The absence of good faith is not of itself a cause of action; it must be buttressed by conduct which the law recognises as tortious or as estopping the part concerned from resiling from his promise or representation. It has been said that "the hard edges of contract formation may be crumbling",[141] but English law has set itself against a general concept of good faith in the bargaining process.

Conversely to this, in the Netherlands emphasis is placed on principles of good faith and of "reasonableness and equity", the latter term seemingly replacing the former; and, particularly where the application of extant rules do not give an acceptable and fair solution, the principle is applied unless parties have made their intentions and expectations sufficiently clear.[142] This development has been important in respect of pre-contractual relations. A milestone was reached in 1957, establishing that where parties commence negotiations as to a possible agreement, then at that moment a relationship is created which is ruled by good faith. This imports that each party must acknowledge that his conduct is controllable by the justified interests of the other. It in fact creates a positive defence to claims for the avoidance of contractual obligations on the argument that when entering into the contract the claiming party had been in error as to certain facts and circumstances. On the basis of the doctrine of good faith it has been found that such party has an obligation to exercise reasonable care and to investigate the circumstances which may be essential as to his decision to enter into the contract.[143] Whilst the result was negative in character the importance of the decision was that it established the existence of a legal relationship between the parties simply as a result of entering into negotiations.

[141] P.S. Atiyah, An Introduction to the Law of Contract, 4th ed, 108.

[142] J. J. Goudsmit, Construction Contracts, in The Dossiers of the Institute of International Business Law and Practice, I.CC, 1990.

[143] H.R. 1957 Baris - Riesekamp.

Tenders [144]

At common law an invitation to tender is not ordinarily an offer binding the employer to accept the lowest or any tender, so that the provision often made that the employer does not undertake such acceptance would be unnecessary.[145] Nevertheless where construed as an express offer to accept the lowest tender the invitation would be binding as such,[146] and so close to the French perception. If the express offer were regarded as giving rise to a unilateral contract in the sense of: "If you make the lowest bid I will accept it" then the likely effect would be to impinge on the ordinary freedom to revoke once an offeror started to perform the condition.[147] The result would give a remedy beyond breach of the obligation to maintain the offer for the time necessary for due examination under Article 932 and would reflect more closely that achieved by the civil law principle of *culpa in contrahendo.*

Indeed the common law does permit remedies in situations that would be understood by a civil lawyer as referable to the principle of *culpa in contrahendo* , despite the absence of such a principle, and, additionally, the presence of an approach that gives a wider margin for non-effective offers[148] than perceived in civil law; the rigidity of the search for the conclusion of the bargain as the watershed from no contract to contract; the facility for revocation prior to actual acceptance; and no statutory assistance. Where, under unambiguous and familiar procedures, tenders from known parties were sought, a tenderer duly complying and submitting his tender was contractually entitled to have it considered alongside others, and the failure to open or consider it was held to be a breach of contract.[149]

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[144] "You just sat there thinking that this piece of hardware had 400,000 components, all of them built by the lowest bidder", David Scott, Apollo 15 astronaut, on waiting for blast-off.

[145] Moore v Shawcross (1954) C.L.Y. 342, (J.P.L.431).

[146] South Hetton Coal Co. v Haswell Coal Co. (1898) 1 Ch. 465 (C.A.).

[147] Harvela Investments Ltd. v Royal Trust Co. of Canada (1986) A.C. 207 (H.L.) per Lord Diplock at 224. Danlia Ltd. v Four Millbank (1978) 1 Ch. 231 at 238 (C.A.).

[148] In the sense that the common law ascribes only the quality of an invitation to treat.

[149] Blackpool & Fylde Aero CLub v Blackpool Borough Council (1990) 1 W.L.R. 1195 (C.A.). This was despite the expression in the invitation to tender of the statement that the employer does not undertake to accept the highest, or indeed any tender at all. The court did not go on to reach a decision on the alternative finding of negligence. J.N. Adams and R. Brownsword, More in expectation than hope: the Blackpool airport case. (1991) 54 M.L.R. 281.

In the English construction industry it is an accepted usage that the costs of the preparation of tenders are borne by the tenderers. Each contractor is aware of the limited chances he has of success and tendering costs are contractors' overheads, consequently employers pay indirectly for unsuccessful tendering costs. Only in very limited cases is remuneration provided for competing tenderers, and it seems economically acceptable for tenderers to bear their own costs .[150]

Where negotiations are commenced and continued with one contractor there may exist a different situation observable under civil law, which will of importance if the negotiations are broken off notwithstanding the fact that substantial costs have been made by the contractor during this period. Thus in the Netherlands a municipality commenced negotiations with contractor C which became prolonged and detailed after it transpired that C's sole competitor's price was higher. There had been no formal tender procedure. C therefore had reason to believe and to trust that he would be awarded the contract, but the municipality terminated negotiations and awarded it to a third contractor who during the period of negotiations offered a lower price. C's action for the costs incurred and lost profit was successful. The court concluded:

> "Negotiations as to an agreement entered a stage, where the breaking off of such negotiation must be considered under the circumstances to be in violation of the principle of good faith in particular as the parties *vis à vis* each other could assume that an agreement would be the result of the negotiations in question."[151]

The rules for tendering for public works are one aspect where harmonisation has been invoked in order to stimulate competition within the EEC and across national boundaries.[152] Their perceived magnitide of impact in England reflects the English isolation from the influence of the principles of good faith and *culpa in contrahendo* , which, as developed in civil law, rendered regulation of tendering desirable within national contexts. In 1986 the Netherlands introduced new tender regulations offering a practical

[150] This reflects the perception that the design function has been carried by the professionals, and is abetted by the use of detailed bills of quantties and the rules for measurement under the Standard Method of Measurement.

[151] Supreme Court of the Netherlands, J. J. Goudsmit, op. cit..

[152] Professor W. Heiermann, The EC Directive Concerning Coordination of Procedures for the Award of Public Works Contracts. (1990) 7 I.C.L.R. 76.

solution to problems encountered with precontractual obligations, particularly the question whether by the invitation to tender and participation by a tenderer a legal relationship is created comparable with that pertaining during negotiations. With no contract awarded no contractual relationship existed to remedy the consequences of acting in defiance of the rules, and difficulties abounded. The 1986 tender regulations contained an arbitration clause entitling those involved to submit any conflict to an arbitration tribunal.[153] Organisations representing the interests of contractors were so entitled, and this was introduced to safeguard the anonymity of contractors not wishing to raise disputes with prospective clients,[154] so that by accepting the invitation to tender, a legal relationship is created which reflects aspects of a complete contractual relationship.

[153] Generally arbitration agreements are required to be entered into in writing and be clear and unambiguous, but under the new tender regulations the sole fact of submission of a tender to the employer binds the tenderer and employer to arbitration. The impact is dependent on the speed with which the arbitration procedure can be completed. The issue in most cases is that the contract is being awarded incorrectly to a tenderer who does not fulfil the tender conditions. To restrain this the award must be given before a contract has been entered into, although it has been postulated that under certain circumstances a contract already entered into may be declared void.

[154] A concern well explained by the House of Lords Select Committee on the European Communities in its Report, Compliance with Public Procurement Directives, 12th Report 1987-88, HL 72, para. 53, "It is likely that the tenderer still hopes subsquently to do business with the procuring authority; and ... he will not want to bite the hand that feeds him."

[3] PERFORMANCE AND DAMAGES

1 Performance

Performance is the aim of any contract, in accordance with the terms and obligations attaching to it. On failure the aggrieved party may seek relief by way of requiring actual performance, but more usually relief will be by substitution of the obligation to pay compensation. Even specific relief will inevitably not give the actual promised performance if only because the enforced performance is likely not to take place at the time stipulated. A basic obligation of the contractor is the achievement of the promise within the time agreed, with such performance being in a workmanlike manner, and, while problems abound on facts as to whether work done is in conformity with the contract, inevitably the timeliness of the overall performance is connected.

Analyses of delay in performance are frequently focused on questions of fault as introduced by contract provisions, but delay and its consequences may occur without regard to whether it derives from fault. Delay by reference to fault can ordinarily be distinguished from those contingencies which would otherwise affect or prevent the timely performance of the obligation, but which may be provided for within the contracts as giving rise to new or extended dates by which performance is to be completed. Fault itself though is inadequate as the distinguishing line between performance and breach, for whilst fault may lead to failure to perform, or to delay in performance, the central questions in assessing a given performance will be to ascertain where the parties have provided for the responsibility for anticipated eventualities to lie, and, if they have not anticipated them, where the law places responsibility.

The partial or total failure to perform may additionally require that the contract obligations as a whole be resolved between the parties, so that the aggrieved party may wish to refuse to accept further performance and recover back any performance that he has rendered. In French law this is known as the *résolution* . The common law term rescission has a variety of shades of meaning, but the process is clear, as one of terminating or simply putting an end to the contract. The need for such a measure may not arise where the facility for the aggrieved party simply to withhold further counter-performance is invoked. Equally this process may be an addition to a claim for compensation. These features can be separated for consideration into the compartments of enforced execution, monetary compensation for breach, circumstances giving rise to relief from performance, time for performance and damages for late completion, and the bringing to an end of the execution of works.

2 Specific Performance

A failure by the contractor to execute the work whether in whole or part, or by the employer to permit the work to be executed, gives rise to consideration of specific performance as a remedy. It seems that in civil law jurisdictions where the remedy of specific performance is available the same features and difficulties that have led to the commonly held view that the English courts will not award specific performance of a building contract, have impinged on the practical use of such remedy, and the unwilling workman or contractor will not ordinarily be directly compelled to do the promised work.

French law distinguishes between various forms of *réparation* or *exécution* in permitting enforced performance. The content of the obligation is critical. Deriving from its social aims the Code Civil was concerned to safeguard the *debiteur* from personal constraint resulting from obligations, and it was considered less oppressive to owe money than to be liable to compulsion to perform. In consequence enforced performance in France may constitute the restoration or fulfilment of the state of affairs which should have existed,

réparation ou exécution en nature , or of compensation by a substitute, *réparation par équivalent* , or *éxecution en équivalent*.

The nature of obligations is contrasted between those to do or not to do, *de faire ou de ne pas faire* , which resolves itself into damages in case of non-performance, and the *obligation de donner* or to transfer property.[1] The latter is concerned with the transfer of ownership, and the contrast renders the complexities of the availability of *exécution en nature*[2] of little practical importance in building contracts. However, where the fulfilment of the obligation to do or not to do, distinct from the obligation to transfer property, does not depend upon personal participation, performance may be procured by a substitute, and in France[3], Italy[4] and in Germany[5] the claimant may be authorised by a court to have work completed by another person and charge the *debiteur* with the cost.[6]

This is not specific performance in its English sense, but there is available a means of securing performance by the defendant himself. The French courts have retained the remedy of awarding a penalty, *astreinte* , of a sum of money per day to compel a recalcitrant contractor to fulfil his obligation *in specie*.

In English law the power to order specific performance of a contract to build or repair exists,[7] notwithstanding the general premise that specific performance of a building contract will not be ordered. This premise relates to an ordinary contract for works and although there have been broad judicial statements of old which deny the very possibility of specific performance,[8] it is at least qualified by "a building agreement where the consideration is the grant of a lease, where the court will order the grant to be

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1 The description of a contract in Article 1101 is in terms of an agreement to give, to do or not to do something.

2 Article 1184 al. 2, *"forcer l'autre à l'exécution "*; Article 1610 *" demander ... sa mise en possession"*.

3 Article 1144.

4 Codice Civile Article 2931.

5 BGB §§887.

6 Although where performance has become impossible French law does not impose liability for delivery of a substitute.

7 These are still sometimes used; Price v Strange (1978) 1 Ch. 337 at 359 (C.A.).

8 In Lucas v Commerford (1790) 3 Bro. C.C. 166 at 167, per Lord Thurlow; Merchants' Trading Co. v Banner (1871) L.R. 12 Eq. 18; Cubitt v Smith (1864) 11 L.T. 298; and, Wilkinson v Clements (1872) 8 Ch. App. 96.

made after the building is done."[9]

As an equitable remedy a hurdle to obtaining such an order is the requirement that damages will not adequately compensate the plaintiff, and secondly, the definition of the performance in order that compliance or non-compliance may be ascertained. It was on the need for precise definition that the presumption arose such that "it is settled that, as a general rule, the court will not compel the building of houses".[10] The courts though have not applied this consistently. Whilst on occasions regarding the objection that they cannot adequately supervise building contracts as conclusive,[11] acknowledgement exists that "they could order specific performance in certain cases in which the works were specified by the contract in a sufficiently definite manner."[12] Another factor is possession of the land on which the construction takes place. This element is unlikely to be available to a contractor on a claim to restrain an employer from terminating work, for in the ordinary building contract his occupation is by way of licence.[13]

Much nineteenth century litigation involved railway construction, and whether action was brought by contractor or employer the result was a refusal to grant specific performance when the works were indefinite; but in *Wolverhampton Corporation v Emmons* [14] the conditions of sufficiently defined work and possession were present.[15] Nevertheless in *Carpenters'*

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[9] Halsbury's Laws, 4th Edn., para. 1287.

[10] Sir G. Mellish L.J. in Wilkinson v Clements (1872) L.R. 8 Ch. 96 at 112.

[11] Blackett v Bates (1865) 1 Ch. App. 117; Powell Duffryn Steam Coal Co. v Taff Vale Rly Co. (1874) 9 Ch. App. 331; Wheatley v Westminster Brymbo Coal Co. (1869) L.R. 9 Eq. 538.

[12] Wolverhampton Corpn. v Emmons (1901) 1 K.B. 515 at 524, per Collins L.J. Equally, City of London v Nash (1747) 3 Atk. 512 at 515-6, per Lord Hardwicke L.C.; Moseley v Virgin (1786) 3 Ves. 184 at 185, per Lord Loughborough: Brace v Wehnert (1858) 25 Beav. 348 at 352, per Lord Romilly M.R.; South Wales Rly Co. v Wythes (1854) 5 De G.M.& G. 880 at 888, per Turner L.J.. In Hepburn v Leather for example the court ordered the defendant purchaser of land to perform his promise to build a wall to a specified thickness and height; (1884) 50 L.T. 660, but not well reported.

[13] As considered in Hounslow L.B.C. v Twickenham Garden Developments Ltd. (1971) Ch. 233.; where the contract was on the 1963 Edition of the JCT Standard Form of Building Contract.

[14] (1901) 1 Q.B. 515 (C.A.). The plaintiff had conveyed land to the defendant in respect of a scheme of street improvement and the defendant had covenanted to erect buildings within a certain time. Whilst there was undoubtedly a public interest element in permitting implementation of an improvement scheme for insanitary conditions, the court did not regard this as determinative in granting specific performance.

[15] The fact of the conveyance that gave the purchaser/defendant absolute possession of the land was a critical feature, and the building work was part of the consideration, so enabling the court to conclude "that the plaintiff has a substantial interest in having the contract performed which is of such a nature that he cannot adequately be compensated for breach of contract adequately be compensated for breach of contract by damages", per Romer L.J. at 525.

Estates v Davies [16] it was not regarded as essential that the defendant should have obtained possession of the land on which all the work was to be done under the contract the subject of the claim. Further, to identify a rule that the building works must be clearly specified does not mean that the contract has to be so specific that it leaves "no room for doubt", for in *Molyneux v Richard* [17] the covenant of which performance was ordered was to erect dwellings similar to those in a particular street and it was not fatal that there was "some little variety" in the cottages to be copied.

Cases where attempts to compel building works succeeded were not mirrored in converse attempts of contractors to prevent by injunction either the interference of employers in the execution of works, or the exercise of rights of termination.[18] The justification was that damages would be adequate compensation, and it would be improper to force on the employer a person "to perform these works whom they reasonably or unreasonably object to",[19] so reflecting objections found in refusals to order specific performance of contracts for personal services.[20] Further, in such cases courts would not have compelled specific performance, and the grant of an injunction would necessarily have amount to indirect specific performance.[21] Similar reasoning was used in restraining a contractor from preventing the employer from exercising a contractual right to complete the works in the event of the engineer not being satisfied with the contractor's progress.[22]

In *Hounslow v Twickenham* [23] the contractor refused to leave the site,

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16 Carpenters' Estates Ltd. v Davies (1940) Ch. 160. It was there ordered that the defendant should lay the sewers on her own land as she had promised. If this had not been done the plaintiffs could not have built on the land which the defendant had sold to them, and adequate compensation at law would not have resulted.

17 Molyneux v Richard (1906) 1 Ch. 34 at 40, per Kekewich J..

18 Garrett v Banstead and Epsom Downs Rly Co. (1864) 12 L.T. 654.

19 Garrett v Banstead and Epsom Downs Rly Co. per Kekewich J.

20 That it would be "hard" to thrust on to a defendant a person "who is objectionable to him", Pickering v The Bishop of Ely (1843) 2 Y & C. Ch. Cas. 249.

21 Munro v Wivenhoe and Brightlingsea Rly Co. (1864) 12 L.T. 655 at 657. Knight Bruce L.J. accepted that an injunction might lie if it were "plain, quite uncontested" that there was no title to declare the contract void.

22 Cork Corpn. v Rooney (1881) 7 L.R. Ir. 191, where Chatterton V.C. suggested that the result might have been different if it had been the plaintiffs own wrongful acts or defaults which had prevented adequate progress. The defendant contractor was regarded as adequately protected by the plaintiff's undertaking to abide by any order for damages.

23 Hounslow L.B.C. v Twickenham Garden Developments Ltd. (1971) Ch. 233. The contractor was occupying the site for the works and the plaintiff determined the contractor's employment under the building contract. The validity of the determination was challenged.

denying the validity of the determination of his employment. In the course of refusing an injunction it was thought, but left open, that the contract would be specifically enforceable. The nineteenth century cases, where contractors had sought the injunctions, were distinguished, but it was not considered that because the court would not restrain an employer from the exercise of his powers of removal under the contract he would be entitled to an injunction to enforce them.[24] This reasoning would lead to the result that a contractor might compel an employer to accept building which he does not in fact want on his land.[25]

There must be a critical distinction between an action to compel an employer to allow a contractor to build against the employer's wish, even in breach of contract, and one to compel a contractor to build. Damages are unlikely to recompense an employer adequately when facing an unwanted contractor on his land, and balancing of convenience is unlikely to favour maintaining an unwanted builder in occupation of the owner's property.[26]

Specific performance ought to be capable of development in English law, so as to at least warrant serious consideration for its application in special circumstances in the construction field,[27] particularly contracts for vital elements of a whole scheme where the remedy would form a valuable and viable option where no other contractor is available to perform them. The supposed difficulty of supervision of the performance as an objection to implementation of the remedy is exaggerated. Works of a specialised nature or those involving the use of a particular contractor's patented method or

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[24] Hounslow L. B. C. v Twickenham Garden Developments Ltd. (1971) Ch. 233, per Megarry J at 251. "No doubt the doctrine of mutuality is subject to many exceptions, but if in the present case the contract is specifically enforceable by the Borough, it is not easy to see why it should not also be specifically enforceable by the contractor".

[25] The decision, in 1971, on the affidavit evidence was that the plaintiff had not made out a prima facie case. In American Cyanamid Co. v Ethicon Ltd (1975) A.C. 396 (H.L.) it was decided that there was no such requirement, and that only a serious issue to be tried had to be shown. If shown and damages would be an adequate remedy then no injunction is granted. If inadequate then, with the protection of an undertaking in damages, the balance of convenience determines the grant or refusal of the injunction. Applying this, the outcome would in all probability have been the other way.

[26] Where an employer had served notice of determination under clause 63 of the I.C.E. Conditions (5th Edition) expelling the contractor from site, the contractor challenged it but failed to secure an injunction restraining its implementation; and the balance of convenience favoured strongly the court supporting the Engineer's decision; Tara Civil Engineering Ltd. v Moorfield Developments Ltd. (1989) 46 B.L.R. 72.

[27] Added to the longstanding use [as in City of London v Nash (1747) 3 Atk. 512.] of specific performance in the landlord and tenant field to enforce a lessee's covenant to build or repair if sufficiently certain, was Jeune v Queens Cross Properties, (1974) Ch.97, where an order was made requiring a landlord to reinstate a stone balcony to fulfill his covenant to repair.

machinery might render damages inadequate, and such circumstances are not far removed from a contract for the supply of petrol of which specific performance was ordered when other supplies might not have been available.[28]

Such potential is not fanciful, as indicated in the recent Channel Tunnel litigation,[29] concerning the claim by Eurotunnel for an injunction restraining TML from suspending work on the cooling system,[30] so effectively for specific performance. At first instance the judge indicated a preparedness to grant a mandatory injunction requiring the continuance of work, in lieu of which an undertaking was given.

The appeal was allowed and the stay of the action granted in view of the disputes over the price and the right to suspend falling within the arbitration procedure,[31] but of particular interest is that the Court of Appeal would not have interferred with the view that a mandatory injunction should be granted, and its judgment recognises that there is sanction available in such circumstances beyond a liability for damages where performance is witheld. Whilst recognising that normally a mandatory injunction should only be granted if the court feels a high degree of assurance that at trial it will appear to have been rightly granted,[32] the court acknowledged that there were cases where a high standard of probability was not made out but nevertheless an injunction should be granted.[33] The potential harm to Eurotunnel was thought to be such that it might well have been a suitable case for an injunction, and not essential to show strong probability of success.

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[28] Sky Petroleum Ltd. v VIP Petroleum Ltd. (1974) 1 W.L.R. 576.; or the much needed supply of negatives, music and effects tracks for particular films for which a mandatory injunction was granted in Films Rover Ltd. v Cannon Film Sales Ltd. (1987) 1 W.L.R. 670.

[29] Channel Tunnel Group Ltd. and Others v Balfour Beatty Construction Ltd. and Others (1992) 2 Q.B. 656 (C.A.) (1993) A.C. 334 (H.L.).

[30] Eurotunnel had placed a variation order for the cooling system. Its valuation became disputed and as one of several disputes was referred to the expert panel being the first part of the agreed dispute resolution procedure. Funding on a cost-plus basis was agreed pending agreement or such determination. TML alleged that Eurotunnel had subsequently reverted to paying their own valuations and stated that unless paid in full they would suspend work on the system. Eurotunnel sought an injunction to restrain the suspension. TML cross-applied to stay that action because of the arbitration provisions.

[31] This result was upheld in the House of Lords but by reference to the inherent jurisdiction to stay proceedings. In the House of Lords the important aspect was the potential width of scope of injunctions to extend to the assistance of foreign arbitration but not to effectively supplant the dispute reosolution procedure that the parties had there agreed to.

[32] In accordance with Locabail International Finance Ltd. v Agroexport (1986) 1 W.L.R. 657 (C.A.).

[33] As in Leisure Data v Bell (1988) F.S.R. 367 (C.A.).

The need for precision, and the necessity for a lack of constant supervision by the court,[34] were put into the context of the difficulties where it is a husband maltreating his wife or an employee who proposing to use his employer's trade secrets Indeed strict requirements have been relaxed over the last twenty years, certainly in commercial cases, as can be seen by reference to the terms of Mareva injunctions, where reasonable living expenses were allowed to be expended out of frozen funds, and alteration and clarification of terms is common. Accordingly, although orders will still not be made which require active supervision by the court the courts may be less unwilling to order compliance with a construction contract where the balance of convenience requres it.

Starting from the proposition that a contract should be performed and duly performed it is suggested that in France a normal remedy is to order specific performance whenever this is possible.[35] It is in what is possible that the proposition of normality fades. Article 1184 al. 2 of the Code Civil provides that a party to a synallagmatic contract who has not received what he was promised is entitled to demand *résolution* of the contract and damages, or to require the other to perform the agreement in so far as that is still possible.[36]

The absence of the language of the exceptional nature of the remedy as applied to specific performance in England is a separating feature, and the derivation of the difference may lie in the perception of contract. French law placed emphasis on the moral nature of the obligation,[37] *pacta sunt servanda* , you must keep your word, and if you do not, the State and law will oblige you to do so. English law emphasises the bargain, and, in the event of damage suffered in consequence of a breach an award of damages would be the normal remedy, with ease of enforcement in mind.

French law brought to bear the fundamental freedom of the individual, so as not to oblige him to carry out personally a piece of work which he has

[34] The principles reiterated in Redland Bricks Ltd. v Morris (1970) A.C. 652 (H.L.) per Lord Upjohn at 666.

[35] R. David: English law and French law.

[36] Article 1184, al. 2.

[37] Stressed by the canonists, for whom it was a sin for a person not to fulfil his promises.

promised to do, and the antipathy towards enforcement at the inception of the Code Civil led to the principle provided by Article 1142 that "Every obligation to do or not to do gives rise to a liability in damages in the event of non-performance on the part of the obligor."[38] As a theory it was too sweeping,[39] and was considerably curtailed in court so that its terms are not applied to all obligations to do or not to do.[40] The Article does not expressly draw any distinction between acts which can or cannot be vicariously performed; but there is such a distinction made, and Article 1142 only prevents the direct performance of the latter so as to prevent the specific enforcement of a contract by a tradesman to render services.

The derivation of Article 1142 is from Pothier[41] who drew the distinction[42] between obligations to give something and obligations to do something from Roman law and, applying the concept that no-one should be forced to do, concluded that the remedy was in damages. Pothier saw no real distinction between types of property or between obligations which were hard to enforce and those which were not, but in adopting his premise the draftsmen of the Code were giving effect to a distrust of inherent judicial power. In consequence the Code Civil left a substantial gap in practical effectiveness.

The basic principle was qualified by Article 1144 under which the court might empower the creditor to procure a third party to do the act promised.[43] This provision created the *faculté de remplacement* . The buyer of generic goods could obtain goods provided for under a contract from elsewhere at the expense of the seller, but the principle was inapplicable where no replacement was possible or where the personal co-operation of the *debiteur* was required. The authorisation within Article 1144 has been taken as

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[38] Article 1142: *" Toute obligations de faire ou de ne pas faire se résaut endommages et intérêts, en cas d'inéxecution de la part du débiteur."*

[39] It was not adopted by the two Civil Codes of Louisiana or Quebec which are based on French law.

[40] Treitel, Remedies for Breach of Contract, Vol. VIII, Ch.16, International Encyclopaedia of Comparative Law. For example a vendor's obligation to deliver goods was treated as an *obligation de donner* and not as an *obligation de faire*.

[41] Pothier, Traité des Obligations, 158 .

[42] This is found in Article 1126 by which "every contract" has as its object either something that the obligor has promised to give or something he has promised "to do or not to do".

[43] Article 1144: *"Le créancier peut aussi, en cas d'inéxecution, être autorisé à faire exécuter lui-même l'obligation aux dépens du débiteur."* [The Obligee may also, in the event of non-performance, be authorised to perform the obligation himself at the expense of the Obligor.]

l'autorisation de justice ,"[44] so that judgment for substituted performance is required from the *juges du fond* who have at their disposal an inherent power to secure such performance of an obligation.[45]

Performance at the expense of the *debiteur* was a form of indirect *exécution en nature*, and subject to the objection that the expense of the substitute performance had first to be incurred with the attendant risk of subsequent non-recovery.[46] This has been met by the Law of 9th July 1991[47] which adds to Article 1144 provision for an order for advance payment of the necessary sum.

Another qualification to the width of Article 1142 follows in Article 1143[48] which addresses violations of obligations to forbear. If the *debiteur* is bound to refrain from certain behaviour the Article empowers the claimant to require the removal of anything made or done in breach of this duty. To execute this the claimant may, by authorisation of a judgment, remove anything constructed by the *debiteur* in breach of the obligation, such as building work put up in contravention of terms of a lease, and charge the *debiteur* with the expense of so doing.

This enforcement of the negative obligation is of practical value for works in apartments or in buildings the subject of coproprietorship, a *lotissement* . By virtue of Article 1143 an owner within a *lotissement* has the right to require that anything done in contravention of the articles binding the co-proprietors be removed. Provided the breach is established and no question of impossibility of demolition has been raised this right exists independently of

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[44] Soc. 5 June 1953: Dalloz. 1953, 601. Also, Civ. 3e 29th November 1972: J.C.P. 73, IV. 14; Bull. III, n. 642, p. 473.

[45] Civ. 1, 3rd October 1956: Bull. 1 n. 328, p.266.

[46] Treitel, op. cit.

[47] Loi 91-650, 9th July 1991, article 82. By article 97 this comes into force on the first day of the 30th month following the month of its publication, namely 1st February 1994. The addition to Article 1144 is: *"Celui-ci peut être condamné à faire l'avance des sommes nécessaires à cette exécution."* [The *debiteur* may be ordered to make advance payment of the amount necessary for such execution.]

[48] Article 1143: *"Néanmoins le créancier a le droit de demander que ce qui aurait été fait par contravention à l'engagement, soit détruit; et il peut se faire autoriser à le détruire aux dépens du debiteur, sans préjudice des dommages et intérêts s'il y a lieu."* [Nonetheless, the creditor has the right to request that what has arisen in contravention of the obligation be destroyed; and he may be authorised to destroy it at the expense of the *debiteur*, without prejudice to damages if they arise.]

whether any or any significant damage has resulted.[49] Equally the Article applies to breaches of planning requirements,[50] giving a private right of enforcement where personal detriment directly caused by the breach is shown.[51]

3 *Astreinte*

Despite the notion of freedom from enforcement, judicial coercion emerged in France within the decades after 1804 in respect of obligations to do or not to do, and with reference to powers under the previous regime.

After issuing a judgment requiring performance *en nature* the court fixed a sum for payment during the time default continued and the obligation remained unfulfilled.[52] This was by *astreinte* , a provisional and revisable measure to reinforce judicial authority, which ultimately could be liquidated into damages. In this lay the source of debate as to the nature of the remedy and its effectiveness; whether if it was a measure of damages it was a true coercion, conversely, if a coercion under the authority of the State, whether a plaintiff should receive more than compensation measured as damages.

Two forms of *astreinte* were available; the *astreinte provisoire* , or *comminatoire* , being the provisional sum fixed but by which the court is not bound when it comes to its final decision; and, the *astreinte définitive* , where the sum to be paid is final and further proceedings simply multiply that rate by the time the default remains extant. The threatened *astreinte* expires at the end of the period fixed, but a new *astreinte* can be applied if performance has not been made within the first period.

An example in the construction field was where a judgment carried an *astreinte* and required a defendant to modify works done in violation of a

[49] Dalloz 1991/2. Civ. 3, 19th May 1981, Bull. civ. III, 101. Also Revue de droit Immobilier, 1990, 192, observations by Bergel, Violation d'une servitude de lotissement.

[50] Provided for by the Code de l'Urbanisme.

[51] Dalloz 1991/2. Civ. 3e, 7th June 1979, Bull. civ. III, 124; also Civ. 3e, 18th February 1981 Bull civ. III, 38.

[52] The sum fixed was per day or per year. An example was Dejardin v Charpentier S. 45.3.393 (Cour d' Appel of Douai 1844) where the lessee of farm had failed to fertilize land and was ordered to restore it or pay 1000 francs a year for the remaining three year term.

landowner's rights. It remained unsatisfied, and the plaintiff sought both to liquidate the *astreinte* and to impose a new one for a further three month period. The court accepted the claim, held the defendant liable for the *astreinte* of F.Fr. 900,000 and ordered him "to proceed with the execution of the works specified in the order ... within a new period of three months starting from the date of this judgment, on pain of an *astreinte* of 10,000 francs per day on default ...".[53]

The *astreinte* is available for use in circumstances where the means of surrogate performance offered by Article 1144 would be applicable, as where a neighbour was ordered to remove a boundary wall,[54] or a vendor to dismantle faulty machinery he had delivered.[55] Courts will give judgment requiring such positive action, or indeed to name an arbitrator,[56] and the *astreinte* is to persuade compliance.

The fixing of the amount highlighted the argument as to the nature of the remedy. It was undoubtedly penal. The *astreinte* had its source in judicial power prior to the revolutionary period which enabled the courts to find and apply it despite the absence of express provisions, *en marge des textes*. This penalty could not be compared with a penalty due to the State, and it was taken as a special form of threat and grant of compensatory damages. In the nineteenth century the threat had been seen as the payment of damages, but the duality was that as a threat designed to induce co-operation an amount referable to the harm suffered by the plaintiff would have less impact than an amount depending on the likely recalcitrance of the defendant and his capacity to perform. Nevertheless the liquidation of the *astreinte* was in relation to the amount of economic harm suffered through failure to perform or delay in performing. There was little point therefore in a threat of a vast *astreinte* in the event of non-performance if the conclusion would be an award of ordinary compensation.

The attitude of the French courts has varied. Undoubtedly there was a curtailing of the amount payable on the *astreinte* to that which could or

[53] Riom, 10th December 1956. S. 1957, 112.
[54] Civ. 7th April 1965, Bull. civ. 1965. I. 192.
[55] Civ. 20th January 1913, S. 1913. I. 386.
[56] Paris, 1st March 1951, D.H. 1951. I. 315.

might be justified as damages so as to lead some to view its practical value as negligible.[57] A resurgence appeared in the late 1950's and early 1960's with guidance from the *Cour de Cassation* to the effect that the *astreinte* was unrelated to compensation, and should reflect the degree of fault in not performing and the defaulter's economic circumstances.[58] Its amount became dependent on the degree of obstinacy required to be overcome.

The facts of the case referred to above were that the defendant electricity company, had been ordered *sous astreinte* to execute building operations on its land, but failed to comply. The plaintiff had the *astreinte* liquidated, and a new *astreinte* for three months was obtained which failed to secure performance. This *astreinte* was liquidated and a third granted, per day, for three months. Nothing happened, and this *astreinte* was liquidated.[59] The defendant then reacted, and argued that the *astreinte* had to be limited to the extent of the harm actually suffered. The *Cour d'Appel* rejected this and upheld the judgment, as did the *Cour de Cassation*, concluding that the *astreinte provisoire* is a measure entirely distinct from damages, and designed to overcome the resistance of one who refuses execution.[60] It was not intended as compensation for the harm that may have been suffered as a result of the delay in performance, but should be quantified by reference to the gravity of the fault of the recalcitrant defendant and his circumstances.[61]

Although part of French court practice, the *astreinte* has been criticised on grounds increasingly strengthened as the penal character of the remedy increases; for it is the plaintiff who receives compensation for the harm suffered, and, in addition, the *astreinte provisoire* being designed to overcome the reluctance and fixed in relation to culpability and resources.[62]

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[57] J.P. Dawson, Specific Performance in France and Germany. (1959) 57 Michigan L. Rev., 495. M. Fréyarile, L'Astreinte, D. 1949 Chron. 1., and, La Valeur pratique de l'astreinte, (1951) JCP. I. 910.

[58] P. Raynaud, La Distinction de l'astreinte et des dommages - intérêts dans la jurisprudence française récente", Mélanges Secretan, (1964) 249. A. Tunc, Le Renouveau de l'astreinte en droit français. (1964) p. 397.

[59] Riom. 10th December 1956, S. 1957, 112; 90 days at F.Fr. 10,000 per day..

[60] Civ. 20th October 1959, D, 1959, 537.

[61] *"Une mesure de contrainte entiérement distincte des dommages - intérêts.... un moyen de vaincre la résistance opposée à l'exécution d'une condamnation."* The quantification was to be *"en fonction de la gravité de la faute de débiteur récalcitrant et de ses facultés."* To the same effect were decisions in : Civ. 20th January 1960, JCP 1960. II. 11483; and, Civ. 12th Juy. 1960, Bull. civ. I. 319; and Civ. 17th March 1965, Bull. civ. 1965. I. 143..

[62] Jeandidier, L'Exécution Forcée des obligations contractuelles, Rev. Trim. civ. 74 (1976) 700.

Discussion of the proposal of 1971 to put the *astreinte* on a legislative footing drew the suggestion that it should be divided into two with half being paid to the plaintiff and half to the State. This was not adopted,[63] and the *Loi* of 5th July 1972 provides that the *astreinte* goes in full to the plaintiff and for the clear purpose to apply pressure rather measure compensation.[64]

Whilst true that a claim for performance in France commences as a sanction,[65] the wide terms of Article 1142 with its reference to all obligations to do or not to do have given rise to difficulty; and the contrast with England may not be as sharp as either such premise or the apparent width of the Article indicate.[66] The common law restricts specific performance to where damages are an inadequate remedy,[67] which may be seen in parallel with the provision in Article 1142 of the Code Civil, with the *astreinte* reflecting a path concerned with enforcement once the performance has been secured by judgment, and required because France has no process of contempt of court.[68]

The *astreinte* has been controversial but it has become the preferred method to fill a gap in securing performance which Article 1142 leaves. Further, the facility given by Article 1144 to secure performance by a third party at the expense of the obligor is a means of achieving satisfaction which may be essential in circumstances where specialist materials or processes are involved in construction.

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[63] The suggestion may have been prompted by comparison with Portugal where that result obtains (Article 829-A Código Civil); or with the money penalties which may be imposed in terrorem under §§ 888 and 890 of the German Code of Civil Procedure in judgments ordering a defendant to cease and desist or to co-operate in doing the requisite act, where the penalty goes to the state treasury.

[64] Article 5 of the Law empowers the courts, even of their own motion, to impose an *astreinte* "pour assuner l'exécution de leurs décisions", and Article 6 leaves no doubt: "the *astreinte* is independent of damages". Chabas, D.1972 Chron 271 explains the Law. Belgium (Article 1385 bis, Code Judiciare) and the Netherlands (Articles 3.11.5 and ff. of the new Civil Code in force from 1st January 1992) have adopted the *astreinte*.

[65] Zweigert & Kötz: An Introduction to Comparative Law.

[66] The bringing of the *astreinte* within the legislative framework has released greater opportunities in France according to Jeandidier op. cit..

[67] The ground that a plaintiff seeking performance believes his interests are best served by it may attract greater weight in relation to the balance of convenience in interlocutory proceedings for an injunction.

[68] R. David: English Law and French Law.

It is common that damages are compensatory and are awarded to protect certain recognised interests of the plaintiff, for instance placing him in the position he would have been in had the contract been performed. This may be the expectation, but it includes two separate expectations, first the receipt of the promised peformance and second that of putting it to some particular use. The distinction is identified in Article 1149 of the Code Civil between actual loss, *damnum emergens* , and lost gains, *lucrum cessans* , but it does not appear that any actual use is made of the distinction.[69]

French law does not limit recovery to restitution where the aggrieved party is able to put an end to the contract, for Article 1184, which provides for *résolution* , expressly entitles the aggrieved party to this as well as damages. These would be assessed on the general principles of Article 1149 to 1151 and if that party recovers a benefit from some performance as a result of termination then he would have to give credit for its value. There is not an option to choose between damages and termination in that termination in principle requires the intervention and authority of the court otherwise than in commerce, and *résolution* is not awarded where damages are adequate compensation.

The general principle applies where the purchaser is aggrieved by failure to deliver within the time agreed, so that a purchaser can claim performance or termination together with damages, but in respect of the time default it appears that the *juges du fond* will determine the reasonable time in which the vendor must effect delivery.[70] Latent defects are the subject of a special regime, but in principle the existence of a latent defect in goods gives a choice of remedies, either a price reduction or *redhibition*. This latter involves restoration of the subject matter on the one side and of the price on the other. It protects the purchaser's restitution interest in performancein his favour, but not, in principle, the expectation that the subject matter is free from

[69] Article 1149: *"Les dommages et intérêts dus au créancier sont, en général, de la perte qu'il a faite et du gain dont il a été privé, sauf les exceptions et modifications ci-après."* [The damages due to the creditor are, in general, from the loss which he incurred and from the gain of which he was deprived, apart from those exceptions and modifications hereinafter appearing.]

[70] Dalloz 1991/2. Civ. 3, 10th April 1973, Bull. civ. III, 274.

defect. As to this, if the vendor knew of the defect he must not only restore the price but is additionally liable under Article 1645 for all damages, *tous les dommages* suffered by the purchaser, and by judicial extension knowledge is imputed in the case of the *vendeur professionel* . By Article 1646 lack of such knowledge of the defect restricts the additional reimbursement to the expenses occasioned by the sale *les frais occasionnés par la vente* . It seems that a broad view was attached to the phrase to include consequential losses caused by defects and justified by the word *occasionnés* as opposed to the expenses of the sale itself, but a retreat from this subsequently took place allowing a distinction between the good and bad faith of the vendor.

In France the recovery of an amount based on that required to secure substitute performance under Article 1144 gave a concrete quantifiable element, but with the introduction in 1994 of the facility to require the defaulting party to advance the amount necessary to secure such performance this element will disappear. The Code Civil lays down no time for abstract assessment of damages and it seems that cases have fluctuated considerably. The time of judgment had become generally accepted by the mid 1970's, rather than the earlier adherence to the time of default,[71] although if the claimant has in fact entered into a transaction to meet the loss that time will prevail. There is however no obligation to take such a step and there is no perceivable comparison with the English duty to mitigate.

In civil law countries it is common to distinguish between damages for various kinds of default, and in France there is a sharp distinction between moratory damages which are available for delay in performance, and compensatory damages for other kinds of default. The former are not generally recoverable without a notice putting the *debiteur* in default, a *mise en demeure* , whilst there appears conflict as to whether such is required for compensatory damages. Moratory damages are often sought for delay in the payment of money, where ordinarily only interest is recoverable by virtue of Article 1153, but for delay in performing any other obligation they are assessed on the same principles as compensatory damages. Article 1147 refers to *retard dans l'exécution*, delay in performance, which gives rise to moratory damages, and to *inexécution* , non-performance, which attracts

[71] Cour d'appel Rennes, 28th May 1926, D.P. 1928. 2.161.

compensatory damages.

Remoteness and Directness

The general principle of remoteness is found in Article 1150, namely that the *debiteur* is only liable for such damages as he could have foreseen from the time of the contract. This restriction does not apply where the default in performance is due to the *dol*, fraud, of the *debiteur*, but *dol* is generally agreed to include gross negligence, *faute lourde*,[72] and effectively means a deliberate breach of contract, *faute intentionelle*, or one committed in bad faith.

The debate in France as to the rationale of this exception to the test of foreseeability has been between the view that in respect of a contractual obligation there is attached an implied agreement limiting damages to those foreseeable, whereas no such implied implied agreement could attach to *dol*, and, the presentation of *dol* in relation to the contractual obligation as a delictual liability, to which foreseeability simply does not apply. It is too easy for the common lawyer to favour the former, but it should be remembered that under civil law contract is treated within the law of obligations and not in a separate compartment, so it is unsurprising that the element of deliberateness in a failure to perform a contractual obligation should attract such an exception.[73]

The provision in Article 1150 that the *debiteur* who but for *dol* is only liable for damage which he foresaw or could at the time of contracting have foreseen is one of a group which define and limit the extent of liability.[74] It is to be read with Article 1149 covering both the actual loss and the loss of the gain, and with Article 1151 providing exoneration from liability for indirect damages. Direct damages are truly to be kept distinct from foreseeable damage, for whilst *dol* creates a liability for damages that may have been unforeseeable this does not extend to those which are indirect. The

[72] Carbonnier, J., Droit civil, iv, 12th edition, 1985.

[73] P. Durry La nature contractuelle ou délictuelle de la responsabilité. (1972) 7 Rev. Trim. Dr. civ. 779. A distinction as to the circumstances for the release from the constraints of foreseeability also arises in respect of delay in the to pay money, the *obligation pécuniaire*.

[74] Code Civil, Book 3, Articles 1146 to 1153, [Damages resulting from the Inexecution of an Obligation.]

requirement of directness imports causation independent of foresight, both of which must be separately satisfied in the absence of *dol*.

The principle of foresight identified in Article 1150 comprises a major doctrine of French law. Adjunct to the circumscription of liability to which it gives rise it reflects the idea of the independence of man and his responsibility for thought within the framework of the obligation undertaken. The common lawyer cites as his starting point the rule in *Hadley v Baxendale*,[75] and of interest is the citation of Articles 1149, 1150, and 1151 of the Code Civil to the English court and the consideration of them in the course of the appeal, to such extent that they were described as "the sensible rule".[76] That the test involved foreseeability was central, and that natural consequences were foreseeable ones, whether by actual or imputed foresight.[77]

A failure to keep the question of foresight (Article 1150) separate from that of directness (Article 1151) leads to confusion in the form of applying the criterion of foreseeability to a determination as to whether the damage is direct. Directness may be more relevant when considering the impact of extraneous events and matters of causation. Foresight in France was the subject of debate as to the factors to which it had to extend, and mere foresight of the cause of the damage and in general terms its kind was advanced as sufficient,[78] without the necessity of foresight as to the extent of the damage. This however appears to have been rejected as unduly reducing the protection of the *debiteur* from liability for unforeseen consequences intended by the Code Civil.[79] The current position is that the liability is for that loss which a reasonable person, the *bon père de famille*, could have foreseen, similar to the limit derived from the *Victoria Laundry* decision in

[75] Hadley v Baxendale (1854) 9 Ex. 341. The damages " ... should be, either such as may fairly and reasonably be considered arising naturally i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time as the probable result of the breach of it." except where special circumstances are known and communicated. The court was consciously formulating a rule by which juries should be directed when estimating damages.

[76] At page 346. Remoteness was considered an unsatisfactory formula: per Alderson B. in argument, "The very term "too remote" is vague. It admits damages may be remote, but that they must not be very remote."

[77] As in Victoria Laundry (Windsor) Ltd. v Newman Industries Ltd. (1949) 2 K.B. 528 (C.A.).

[78] Similar to the result in Parsons v Uttley Ingham (1978) Q.B. 791.

[79] Y. Chartier, La Réparation du préjudice, 1983.

England. The standpoint is at the time the contract was made and this *in abstracto* test is preferred to a view *in concreto*, taking account of the personality of the *debiteur* and his ability to foresee.[80]

The central point is that liability cannot be reduced by a defendant solely showing that he in fact foresaw less. Article 1150 carefully refers to the objective "*qu'on a pu prévoir*" and not to the person "*qu'il a pu prévoir*". The test is of a reasonable man placed in the circumstances of the *debiteur*,[81] and those circumstances reflect matters actually known which may affect foresight and thus liability.[82] In France the assessment of damages is in the discretion of the judges *du fond* and the *Cour de Cassation* will only interfere if it has been exercised on a wrong principle, so that decisions rarely come under attack and even then turn on issues of fact.

The requirement in Article 1151, where the breach of contract results from *dol*, is that the damage that follows must be an *immédiate et directe* consequence of the non-performance of the obligation. Whilst this is not to be confused with forseeability,[83] the restriction on the scope of liability to which it gives rise may equally be satisfied through the test of reasonable foresight.[84]

There are few decisions advanced as illustrations of the requirement of directness; rather, the prevailing view is that no fixed principles can be laid

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[80] Victoria Laundry (Windsor) Ltd. v Newman Industries Ltd. (1949) 2 K.B. 528 (C.A.).

[81] Mazeaud and Tunc, Traité théorique et pratique de la responsabilité délictuelle et contractuelle.

[82] Just as in France so in England; the area of indemnity is what is within the prevision of the defendant as a reasonable man in the light of the knowledge, actual or imputed, which he has at the time of contracting: "Damages which arise under the so-called "second rule" in Hadley v Baxendale, are sometimes referred to as if they were an increased sum which the plaintiff could obtain if he could show "special circumstances", or as if the rule embodied a measure of damage specially beneficial to the plaintiff which he could invoke if he fulfilled the necessary conditions. It is, no doubt, true that it generally operates in favour of a plaintiff rather than against him, but I think that it is capable of doing either.", Devlin J. at first instance in Biggin Ltd. v Permanite Ltd. (1951) 1 K.B. 422 at 435. Where subsale is within the contemplation of the parties "damages must be assessed by reference to it whether the plaintiff likes it or not."

[83] Treitel, Remedies for Breach of Contract, A Comparative Account.

[84] Although Articles 1150 and 1151 would be incomprehensible ifwhat was unforeseeable was assimilated to what was indirect, D. Tallon in Contract Law Today - Anglo French Comparisons (Harris/Tallon eds.) p. 277. The theories of causation, whether the *équivalence des conditions* or *causalité adéquate*, are of little importance in a contractual context.

down, but only guidelines of a most general kind,[85] although one decision reflects precisely the result that would be achieved in England by the application of reasonable foresight. A carrier in breach of contract caused damage to agricultural machinery, so that the plaintiff was unable to perform a contract which required its use. The plaintiff also claimed damages in respect of further contracts which they might have secured with adjoining landowners and this claim was disallowed on the ground that it was not the immediate and direct consequence of the breach.[86]

Liability is not dependent on the failure to perform a contract being the sole cause of the loss. In England "if a breach of contract is one of two causes, both co-operating and both of equal efficacy ... it is sufficient to carry judgment for damages."[87] Either the defendant is liable fully or he is not liable at all. In France there has been a principle that enabled a plaintiff's damages to be reduced where the loss is partly caused by an extraneous event for which neither party has responsibility. In the *Lamoricière* case an unseaworthy ship sank in an exceptionally severe storm and in an action by dependants of drowned passengers the defendants were held liable for 20% of the loss on the basis that this was the extent of the disaster caused by the unseaworthiness.[88] Whilst the action was framed in *delict* the same principle could apply in a contractual action, with no distinction between *delict* and contract to limit it.[89]

The mathematical division in *Lamoricière* attracted criticism because of its arbitrary nature.[90] The decision was an application, in respect of extraneous events, of an approach to causation that is carried out in England by an apportionment on a successful plea of a plaintiff's own responsibility,[91] or as between defendants under the Civil Liability (Contribution) Act 1978. That

[85] Carbonnier, Droit Civil. Pothier's famous example is frequently cited: if a person sells a cow knowing, but concealing, that it is diseased, that is fraud and he is liable for the loss of the cow and the purchaser's other animals infected by it. He is not liable though for the loss of the ability to cultivate his land, or for the loss that he so suffers by being thus unable to meet his debts, Pothier, Traité des Obligations (1761).

[86] Cass. civ. 3rd March 1898, D. 1898, I, 118.

[87] Heskell v Continental Express Ltd. (1950) 1 All E.R. 589.

[88] Cas. civ. 19th June 1951, S. 1952, I, 89.

[89] Treitel, op. cit.

[90] Note Ripert to Cass. com. 19th June 1951, D. 1951, 717; note Bequé to Cass. com. 19th June 1951, J.C.P. 1951, II, 6426; note Mazeaud and Mazeaud, Rev. trim. dr. civ. 1951, 515.

[91] Under the Law Reform (Contributory Negligence) Act 1945.

apportionment is based on responsibility for the resulting damage, and it allows a plaintiff recovery to ameliorate the old common law rule that in an action in tort a plaintiff whose fault contributed with the defendant's to cause the loss recovered nothing. An assumption of full liability of a defendant which has been reaffirmed by the French Courts is inconsistent with *Lamorcière* ,[92] but, despite decisions doubting it, in circumstances of extraneous events recovery of a low percentage may provide a more satisfactory solution than no recovery.

Mitigation and Distress

The principle of mitigation in English law covers two areas, first that there cannot be recovery of a loss which ought reasonably have been avoided, and second that actual benefits gained in consequence of the breach have to brought into account. Contributory negligence may also be seen in the context of mitigation of damage arising from non performance of a contractual obligation, because the reduction takes account of the responsibility of the person who suffers damage for the damage whether or not his conduct contributed to the event causing it.[93]

French law discusses contribution under the heading of *fait ou faute de la victime* by which loss due to such act or fault may attenuate or extinguish liability,[94] but it has no recognition of any obligation on a plaintiff to minimise loss by procuring, however reasonably, a substitute contract. Extinguishment can arise if the victim's act is the sole cause of the loss, but *faute commune* results in a reduction of damages proportionate to the degree of responsibility for it. There is no provision in the Code Civil which expressly sets out a doctrine of contribution, and it has been a development

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[92] Mazeaud and Tunc, Traité; D. Tallon in Contract Law Today: Anglo-French Comparisons. It seems the search for the efficient cause is very similar to that of the effective cause as stated in McGhee v National Coal Board (1973) S. C. 37 (H.L.).

[93] Froom v Butcher (1976) Q.B. 286.

[94] C.S.P. Harding, The Act of the Plaintiff and Concurrent Cause. Fault and causation in French Law of Delict. (1978) 28 I.C.L.Q. 525.

of the courts. Controversy surrounds the exact basis of the reduction,[95] but the principle clearly applies in contract and is used to explain the rule whereby the *debiteur* is not responsible for delay due to the act of the other party.[96] Further, *faute de la victime* may sometimes appear as a form of *cause étrangère*, so as to relieve the contracting party from liability for loss due to such a cause not imputable to him within Article 1147.

Where a loss depends on a contingency or some external event this is not regarded as too remote despite the difficulties of assessment.[97] Causation though must be established whatever problems are posed by quantification. Under civil law a decision of the Supreme Court of Canada on an appeal from Quebec reviewed the question of loss of a chance in the medical context by reference to judicial decisions and academic debate in France, Belgium and Quebec, concluding that where the pre-existing condition was such that there was no probability of cure the approach of loss of a chance of cure was inappropriate.[98]

French law hesitated to award compensation for *dommage moral* or *préjudice moral* which were notions of injuries without readily identifiable pecuniary loss, usually associated with a person's honour or reputation. The right to claim compensation for personal anguish and distress is however now established in respect of actions in contract and may be taken as giving the same result in the building field as pertains in England.[99]

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[95] In England the debate as to the application of contributory negligence in contract has centred on the definition of "fault" in section 4 of the Law Reform (Contributory Negligence) Act 1945 and its applicability at all to an action in contract, Vesta v Butcher (1989) A. C. 852; Law Commission Consultation Paper No. 114, Contributory Negligence as a Defence in Contract. (1989). It has no application where liability arises from breach of a contract provision which does not depend on failure to take reasonable care, Barclays Bank plc. v Fairclough Building Ltd. (1994) The Times 11th May 1994.

[96] Cass. req. 30th January 1929, Gaz. Pal.. 1929. I. 575. The jurisprudence in France may be rationalised in terms of mitigation, but it is a concern not to allow a plaintiff to increase the damages for lossses which were avoidaable, rathe than an emphasis on the response of the plaintiff to a breach.

[97] Chaplin v Hicks (1911) 2 K.B. 796 (C.A.).

[98] Lawson v Lafferiere (1991) 78 D.L.R. (4th) 609. In the building context, lost opportunity to do remedial work would not, it is thought be taken to be the loss for assessment where such remedial work would not on the probabilities save the building. This decision deserves consideration in England as it supports the strong hint for rejection of the lost chance approach in all but the traditional exceptional cases given in Hotson v East Berkshire Hospital Authority (1987) A.C. 1250 (H.L.).

[99] K. Franklin, A Review of the Award of General Damages in Building Cases, 1992, 8 Constr. L.R. 318; and elsewhere, Barnett I.H., Commonwealth Claims for Inconvenience In Building Matters 1992, Vol. 8, C.L.R. 212.

[4] **RELIEF FROM PERFORMANCE**

Relief from Performance

Exceptions to the ordinary consequences of failure to perform bear significantly on the obligations that parties assume, as where performance is prevented by circumstances whose occurrence, in accordance with their intention, is outside the risk of the potential bearer of liability. Appreciation of these is central to the balancing of risk sought by the parties' own provision.

Impossibility is such a circumstance acknowledged under both common law and civil law, whether it is impossibility extant when the contractual relationship is made or subsequently supervening. Between performance being, or being rendered, totally impossible, and a performance that is still physically or economically possible, but not practically, sensibly or reasonably possible, lies a region of potential uncertainty for its application. The uncertainty is the greater as formulations of the result of circumstances preventing performance depart from total impossibility to grades of impossibility.

Depending on particular contract terms, events which might otherwise be treated by the law as giving rise to an excuse from performance are often the subject of express provision within the confines of the building contract, so preserving the obligation to perform despite the interruption of those events, or, subject to their severity, creating a contractual right to end physical performance.[1]

[1] Referred to under Termination.

This requires an examination of circumstances where performance may be excused at law, and consideration of contract provisions that may preserve the obligation to perform, whether or not with the addition of an extended time or increased price by way of relief or compensation, or a provision that may permit a termination. Whether, and the extent to which, such contract provisions may be viewed as beneficial or adverse to a party as an allocation of risk depends essentially on the treatment that would follow without such provisions, and the extent of benefit from the perceived certainty of express provisions depends on the relative certainty of result that the law provides.

External forces causing unexpected difficulty or expense ordinarily provide no grounds for escape from due performance in English law. The doctrine of frustration is available for those circumstances where some catastrophic or fundamental event occurs so as to release both parties from their contractual obligations. The principle may be invoked where the law recognises that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it radically different from that which was undertaken by the contract.[2] The concept of an implied term, that if the event under consideration occurred then the parties would have regarded each as released, is not a sound base for inquiry into frustration when lack of foresight of the parties is an important factor in determining the application of the doctrine, which is by the law recognising an inability to foresee the frustrating event.

In the field of construction the circumstances in which performance is called for are frequently different from the perception of the parties at the outset. However, their contract, if following a standard form, is likely to have contemplated changing or different circumstances and to have provided for many eventualities, and debate, in practitioners' terms, is more usually as to the application of the provision to the circumstances within the framework of the contract.

For parties to make provision within their contract for frustration and its consequences in monetary allocation is to negate the application of the true

[2] Lord Radcliffe in Davis Contractors Ltd. v Fareham Urban District Council (1956) A.C. 696 (H.L.).

principle, which destroys the contract, necessarily putting an end to the rights and liabilities of the parties under it.[3] The effect of contemplation of an event which the law might have regarded as a frustrating circumstance and of provision as to its consequences, is to prevent the law from viewing that event as one of true frustration; and the parties' provision itself resolves the primary obligations as to performance into secondary obligations on the occurrence of the circumstance. The ICE form of contract reflects this by its provision that in the event of the contract being frustrated the sum payable for the work executed is the same as if the contract had been determined by the employer under the war clause.[4]

The doctrine of frustration as developed in England within the last century, and which has absorbed impossibility of performance, is not known as such in French law, but its purpose is served by two doctrines, those of *force majeure* and *cause*. The relationship of these to impossibility is important. A promise to perform the impossible is null, *imposibilium nulla obligatio* ; if impossible from the outset the *objet* is impossible and there is no contract. Once the contract has come into existence the effect of the supervening event is to release the obligation to perform but not, without that event amounting to a *cause ètrangère*, from the liability for damages. Even then the point remains as to whether and when non-performance permits avoidance of the contract.

The English JCT and the French AFNOR standard forms of building contract utilise the term *force majeure* as a description of that which may give rise to an extension of time for performance, but, for the purposes of investigating the effect on a contract itself of events amounting to *force majeure* in the context of relief from performance, it is the relief from the physical performance and the prime obligation to complete that is considered.

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[3] Afterwards governed by the Law Reform (Frustrated Contracts) Act 1943.

[4] ICE 6th Edition, 1991. Clause 64.

In France, Article 1134 identifies the principle to be compared with the binding nature of contract as in England,[5] and it forms the basis for examining the effects of extraordinary events or resulting obligations to be compared with the factors of impossibility and frustration which may relieve from it. In Article 1134 the principle is internally qualified by the facility for revocation for reasons authorised by law. It provides that "Agreements legally entered into have the force of *loi* for the parties thereto. They may be revoked only by mutual consent or upon grounds allowed by law. They shall be performed in good faith."[6]

The *Cour de Cassation* stated its view of this Article in 1876 in the celebrated *Canal of Craponne* case, and such view still prevails:

> "the rule given in this Article is a general one, an absolute one, and governs contracts the performance of which is to happen through payments made in successive times as well as contracts of a different type; ... the Courts are in no case empowered, however equitable their decision may appear, to take into consideration lapse of time or other circumstances in order to modify the contracts entered into by parties and to substitute new clauses for those which have been accepted by the contracting parties of their free will."[7]

The compilers of the Code had included specific matters that were identifiable as grounds for annulment or dissolution, but the scope of the Code was not limited to circumstances that rendered contracts a nullity, nor as to what would be allowed by law. If a certain or determined thing which constituted the subject matter of the contract was lost, destroyed or taken out of commercial use, then the obligation was annulled.[8] Similarly, the death of the employer or the tradesman, architect or contractor dissolves the contract

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5 Paradine v Jane (1647) Aleyn 26, "When the party by his own conduct creates a duty or charge upon himself he is bound to make it good, if he may notwithstanding any accident by inevitable necessity becuase he might have provided against it by his contract."

6 Article 1134: *"Les conventions légalement formées tiennent liéu à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement actual, ou pour les causes que la loi autorise. Elle doivent être exécutées de bonne foi".*

7 Cass. Civ. 6th March 1876 D. 1876.1.193, note Giboulet. The case is considered under La Théorie de L'Imprévision.

8 Article 1302. Expropriation is an example of the latter. Further, by Article 1601 if at the time of a sale the article sold had wholly perished the sale is void, and by Article 1722 he destruction of the thing leased gave rise to the annullment of the lease.

for the hire of services.[9]

A party to a contract must fulfil his promise, but where its fulfilment becomes impossible owing to an event which is independent of his will and which raises an insuperable obstacle to its execution then the mutual obligation disappears.[10] This arises because failure to perform an obligation to do or not do generically results in an action for damages, and by way of relief from such damages French law interposes the effects of such external force or event as might fall to be considered as a frustrating event at common law. It is by Article 1142 that every obligation to do or not do, *toute obligation de faire* , resolves itself into damages in the event of non-performance by the obligor, but the obligee's substituted liability to pay damages is ameliorated by two important principles, in Articles 1147 and 1148.

Article 1147 provides for payment of damages either for non-performance of the obligation or for the delay in its performance, wherever the obligor fails to prove that the non-performance resulted from an external cause, *cause étrangère* , which cannot be imputed to him, even though there has been no bad faith on his part.[11] The nature of this liability is distinguished from the liability imposed under Articles 1382 *et seq* , dealing with neglect, *délit* , for those Articles have no application when the matter concerns fault committed in the non-performance of an obligation, *obligation de résultat* , under a contract;[12] although fault does have a role to play in relation to the proof of *cause étrangère* . This distinction is also seen in the divergence between Article 1147, envisaging liability for simple non-performance subject to *cause étrangère* , and Article 1137, where, in relation to the obligation to give something, the attendant obligation to preserve it is one imposing a duty to exercise due care of a *bon pére de famille* . It is explained in terms of a

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[9] Article 1795: *"Le contrat de louage d'ouvrage est dissous par la mort de l'ouvrier, de l'architecte ou entrepreneur"* [A building contract is dissolved by the death of the tradesman, of the architect or of the contractor.]

[10] R.David: English law and French law.

[11] Article 1147: *"Le débiteur est condemmé, s'il y a lieu, au paiement de dommages et intérêts, soit à raison de l'inexécution de l'obligation, soit à raison du retard dans l'exécution, toutes les fois qu'il ne justifie pas que l'inexécution provient d'une cause étrangére qui ne peut lui étre imputée, encore qu'il n'y ait aucume mauvais foi de sa part."* [The debtor is required,where appropriate, to pay damages either for non-performance of the obligation or for delay in performance, whenever he fails to show that the non-performance is due to a *cause étrangère* which cannot be imputed to him, even though there has been no bad faith on his part.]

[12] Dalloz, Code Civil, 1991/2, p. 504, Note 14.

distinction between contracts giving rise to an obligation *de moyens* or *de diligence* , and those which create an obligation *de résultat* or *déterminée* ; namely, between those in which a party will be liable only if he fails to show the diligence due and those in which he is required to achieve the result promised and from which he can only escape liability by showing a *cause étrangère* .

Article 1148 amplifies Article 1147 and exempts the obligor from liability for damages for non-performance when as the result of *force majeure* or fortuitous event, *cas fortuit* , the obligor has been prevented from complying with his obligation, or where it has been prohibited. Article 1148 provides that "There is no requirement for damages when, in consequence of *force majeure* or fortuitous circumstance (*cas fortuit*) the debtor has been prevented from delivering or doing that which he has bound himself to deliver or to do or has done that which was prohibited."[13]

There has been debate and dispute about the utility of drawing a distinction between *cas fortuit* and *force majeure* , but the latter had become paramount in respect of contractual matters by about the 1930's.[14] The term *force majeure* was not defined in the Code and its breadth has derived from its application by the courts over time. Natural forces such as flood,[15] or drought,[16] are the more obvious candidates, while government action may suffice.

In terms of a general rule, three elements are central to the nature of *force majeure*. First its character has to be that of an unexpected and unforeseen event. An act of state is normally taken as a case of *force majeure*,[17] whilst delay by an administrative body in issuing an authorisation may not

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[13] Article 1148 : *"Il n"y a lieu à aucuns dommages et intérêts lorsque, par suite d'une force majeure ou d'un cas fortuit, le debiteur à été empêché de donner ou de faire ce à quoi il était obligé ou a fait ce qui lui était interdit."*

[14] Bourgoin, Essai sur la Distinction du Cas Fortuit et de Force Majeure; Josseraud, Force Majeure et Cas Fortuit. The distinction may be useful, however, in respect of tort liability, where *cas fortuit* signifies an event arising from some cause not external (and so not *force majeure*) but internal to the enterprise or person involved such as a fire not resulting from lightning, an explosion of a boiler or defects in materials.

[15] Durr v Renouard, Trib. Colmar, 27th November 1848, D. 1851 II. 274. Chemin de fer de Midi v Cénac, Cour de Pan, 15th December 1909, S. 1910 II. 13.

[16] Crédit Fancièr v Bollok, Cass. Civ., 30th January 1923, D. 1924 I. 148.

[17] Dalloz 1991/2, p. 507, Note 15: Civ. 1, 29 November 1965: D 1966,101.

regarded as unforeseen.[18] The intervention or interference by an administrative body does not constitute a *force majeure* in circumstances where it is brought about by the behaviour or action of the person against whom it is directed.[19] Importantly, whether or not the event is unexpected or unforeseen must be tested by reference to the time when the contract was concluded.[20]

Second, its character must also be that of an irresistible force so that greater difficulty or a more onerous performance is not sufficient,[21] albeit that occasionally particularly serious impacts may be, even though on one view they may not be wholly insurmountable.[22] There is no *force majeure* if the contractor is capable of performing by means of a substitution or alternative means even if this renders the carrying out of the obligation more burdensome.[23] Where a seller has it in mind to fulfil a contract with goods that become destroyed or requisitioned, his obligation will not be treated as discharged unless the contract requires him to deliver those specific goods.[24]

Third, there has to be something of the external in its character, something that is imposed. Insolvency of the contractor would not suffice, but strikes may, upon analysis of the circumstances, constitute *force majeure* ;[25] for example, a haulier would have to show that his own personnel were not behind the behaviour relied on.[26]

The need for the event to render performance impossible is directly comparable to specific provisions for annulment. Equally derivative are the requirements of independence from the will of the party relying on it, and of not being subject to his subsequent control, together with its occurrence being of a nature that could not have been reasonably foreseen at the time of the

[18] Dalloz 1991/2, p. 507, Note 15: Com. 26 October 1954: D 1955, 213.

[19] Dalloz 1991/2, p. 507, Note 15: Civ. 3, 20 November 1985: Bull. IV, n. 148, p.113.

[20] Dalloz 1991/2, p. 508: Com. 21 November 1967: JCP. 68 II, 15462: D, 1962, 297.

[21] Dalloz 1991/2, p. 508: Civ. 2, 5th December 1927: D.H. 1928, 84. Soc. 8th March 1972: D 1972, 340.

[22] Dalloz 1991/2, p. 508: Civ. 3, 24th June 1971: D. 1971, Somm. 138.

[23] Dalloz: p.508: Com. 12th November 1969: JCP 71 II, 16791.

[24] Meyer v Miravet, Cour de Paris, 8th November 1916.

[25] Dalloz: p.508: Cass. Ch. Mixte, 4th February 1983: Bull n. 1 and 2.

[26] Dalloz: p. 508: Civ. 1re, 3rd Ocober 1967: JCP 68 II, 15365; and possibly that he cannot reasonably employ others, as to which Rivière v Comp. La Seine, Cour de Paris, 13th November 1903, D. 1904 II. 73, may assist in relation to the position of the French hauliers in late June/early July 1992.

contract.[27]

There has been scope for adaptation in the application of the elements required for *force majeure*. In relation to absolute impossibility, as against ability to render performance in some other fashion, reasonableness appears as an element. So in the example of strike an employer would not be required to concede every demand made; and treatment of the event as beyond the control of the party bound will depend on the court's view of his diligence in seeking to overcome the obstacle and its conviction as to his good faith. In respect of defences an illustration of an extraneous event as *force majeure* derives from the *Cour de Cassation* in 1972 in an action against a contractor for damage resulting from leaking sewage pipes due to corrosion of the metal. There was expert evidence which identified the cause of the corrosion as bacteria that had not previously been present. The claim was dismissed on the ground of *force majeure* because at the time there had been no effective means of avoiding such damage.[28]

The doctrine was extended to cases where the foundation on which the contract was based had ceased to exist. Two cases arising out of the Franco-Prussian war of 1870 and the First World War were regarded as significant. In the first those who had taken a lease for hunting on land which became subject to a government prohibition on the firing of guns in that region had their obligation to pay rent discharged by virtue of *force majeure*. Enjoyment of the thing leased related to the rent contracted to be paid, and with a lessee having a right to the peaceful enjoyment of the leased land the court found no difficulty in considering the destruction of the ability to fire guns as the destruction of the right of enjoyment.[29] By the second, the doctrine was stretched to circumstances of hardship as distinct from actual impossibility: a tailor's contract had some years to run when his employer terminated it on the loss of his select clientele in wartime, and the plaintiff

[27] Denson-Smith, Impossibility of Performance as an excuse in French law: The Doctrine of Force Majeure, 1936, 45 Yale Law Journal 452.

[28] Article 1134: *"Les conventions legalement formees tiennent lieu de loi a ceux qui les ont faitee. Elles re peuvent etre revoquees que de leur consentement neutral, ou pour les causes que la loi autorise. Elles doivent etre executees de bonne foi."* [Agreements when legally made are binding under law between those between whom they are made. They may only be rescinded by mutual consent or on grounds provided by law. They must beexecuted in good faith.]

[29] Aguado v de Beam et Consorts, Cour de Paris, 1st May 1895, D. 1875 II. 204. ("the exercise of this right was the essential object of the lease entered into ...").

refused to submit to a suspension of the contract.[30] The court supported its decision that the contract was discharged with reasoning that the intention of the parties was that its performance would be rendered under normal economic circumstances, and that the war in destroying the original basis of the contract constituted *force majeure*.

Whilst criticised as without legal basis by those who emphasised contractual rigidity,[31] it was viewed by others as a desirable application of a sound legal principle, and in keeping with the intention of the parties to dissolve the contract, where it appeared parties had contracted in view of a state of affairs which, as a consequence of events beyond their control, had essentially changed. Its proponents labelled their view as *la théorie d'imprévision*.

The terms of Articles 1147 and 1148 do not address the question of actual discharge from performance, but implicit in relief to the *debiteur* from the consequences of failure to perform is such discharge, and the imposition of *force majeure* on performance leads to this result. Discharge is implicit when considered conceptually, and as a corollary to the function of *force majeure*. Questions as to conditions and counter performance are also swept into a discharge on the result of *force majeure*. A conditional obligation in the Code Civil is one made to depend upon a future and uncertain event.[32] The condition is identified as suspensive if its effect is to suspend the obligation until the particular event has occurred,[33] and resolutory if its occurrence operates to discharge the obligation and return the parties to their

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30 Estève v Dubois et Lacoste, Trib. Toulouse, 1st June. 1915, D. 1916 II. 112, s. 1916 II. 29.

31 Capitant, note, D. 1917 II 33 and s. 1916 II 29. Capitant's major work identified *cause* as the basis for analysis of events which might have created such "impossibility."

32 Article 1168: *" L'obligationest conditionaelle lorsqu'on la fait dépendre d'un événement futur et incertain, soit en la suspendant jusqu'à ce que l'événement arrive, soit en la résiliant, selon que l'événement arrivera ou n'arrivera pas."*. [A n obligation is conditional when it is made to depend on a future and uncertain event, either in suspending it until the event happens or in cancelling it according to whether the event happens or not.]

33 Article 1181: *"L'obligation contractée sous une condition suspensive est celle qui dépend ou d'un événement futur et incertain, ou d'un événement actuallement arrivé, mais encore inconnu des parties. Dans le premier cas, l'obligation ne peut être exécutée qu'après l'événement. Dans le second cas, l'obligation a son effet du jour où elle a été contractée."* [An obligation contracted under a suspensive condition is one which depends upon a future and uncertain event or upon an event having actually happened, but still unknown to the parties. In the first case, the obligationis only to be executed after the event. In the second case, the obligation takes effect on the day when it was undertaken.]

original positions.[34] Conditions are further classified as fortuitous or contingent, potestative, and mixed. The fortuitous condition is defined as one which depends on chance and which is not within the power of either party to bring about.[35] Potestative and mixed conditions by contrast make performance of the agreement depend on an event which either of the parties has the power to bring about or to prevent, and, in the case of the latter, affecting the will of a third party.[36]

Article 1148, as noted, provides that no damages accrue when the obligor is prevented by *force majeure* from complying with his obligation. If the use of the phrase "no damages may be allowed" and the words *debiteur* and "bound" were to be taken to mean that the principle applied only to those under a legal duty with respect to the act involved, a literal application of this Article would seem to limit the effect of *force majeure* to obligatory matters, the non-performance of which would, in their absence leave the obligor liable. If the doctrine of *force majeure* was not applicable to conditions, *force majeure* would not operate to excuse a condition and it would render absolute the conditional right. This view has not, it seems, been taken by the courts. The doctrine appears readily applied to stipulations that are true conditions, namely contract terms, the non-occurrence of which will not render the party liable for breach of contract.

Further, Articles 1147 and 1148 make no mention of the effect of *force majeure* on the obligor's right to a promised counter performance, where his own performance has been excused by *force majeure*, and no provision in the Code specifically covers this point. However, the *Cour de Cassation*

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[34] Article 1183: *"La condition résolutoire est celle qui, lorsqu'elle s'accomplit, opère la révocation de l'obligation, et qui remet les choses au même état que si l'obligation n'avait pas existe. Elle ne suspend point l'exécution de l'obligation; elle oblige seulement le créancier à restituer ce qu'il a reçu, dans le cas où l'événement prévu par la condition arrive. "* [A resolutory condition is one which, when it takes effect, operates to revoke the obligation and returns matters to the same state as if the obligation had never existed.]

[35] Article 1169: *"La condition casuelle est celle qui dépend du hasard, et qui n'est nullement au pouvoir du créancier ni du débiteur."* [A *contingent* condition is one which depends upon a chance and which is in the power of neither the obligee nor the obligor.]

[36] Articles 1170: *"La condition potestive est celle qui fait dépendre l'exécution e la convention d'un événement qu'il est au pouvoir de l'une ou de l'autre des parties contractantes de faire arriver ou d'empêcher."* [A *potestative* condition is one which renders performance of an agreement depend upon an event which is in the power of one or the other of the contracting parties to occur or to prevent.]
Article 1171: *"La condition mixte est celle qui dépend tout à fois de la volonté d'une des parties contractantes, et de la volonté d'un tiers."* [A mixed condition is one which depends on the will of one of the contracting parties at the same time as on the will of a third party.]

has approved the application of Article 1184 which provides that a resolutory condition exists in every bilateral contract where one of the parties does not perform his obligation.[37] This use of this Article was criticised in the past, and the claim made that the proper interpretation of the language used would limit its application to cases where the failure of performance resulted from the fault of the party bound.[38] The argument was, in effect, that the phrase "does not perform," in Article 1184, did not include "cannot perform"; but, whether or not the Article should be applied to such cases, the rule was well established that *force majeure*, which destroys the obligation of one of the parties, destroys at the same time the obligation of the other, just as does impossibility under English law.

There were various explanations of this. Planiol, who objected to the use of Article 1184, maintained that each performance is the condition of the other, so that non-performance by one party constituted a failure of a condition on which his right to the return performance depended.[39] Another writer based the result on the notion of equivalence between the respective promises.[40] More significant than these in the event was the thesis that such non-performance constituted a failure of *cause* with respect to the obligation of the other party.[41] All agreed that one party should not be compelled to perform when he cannot receive the performance promised in return. Nevertheless the courts appear to find no necessity to resort to the conditional analysis, their conclusions ordinarily being supported by reference to Article 1184 without any attempt to deliver or explain the

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[37] Article 1184: *"La condition résolutoire est toujours sous-entendue ans les contrats synallagmatiques, pour le cas où l'une des parties ne satisfera point à son engagement. Dans ce cas, le contrat n'est point résolu de plein droit. La partie envers laquelle l'engagement n'a point été exécuté, a la choix ou de forcer l'autre à l'exécution de la convention lorsqu'elle est possible, ou d'en demander la résolution avec dommages et intérêts. La résolution doit être demandée en justice, et il peut être acordé au défendeur un délai selon les circonstances."* [A resolutory condition is always implicit in synallagmatic contracts, for circumstances where one of the two parties does not comply with his engagement. In such a case, the contract is not rescinded as a matter of law. The party who has not received the performance has the choice either to enforce the other to execute the engagement where such is possible orto seek rescission and damages. Rescission must be sought at law, and the defendant may be afforded a period of grace according to the cicumstances.]

[38] 2, Planiol, Elémentaire Traité Droit Civil. For reasons based on the history of the provision which was traced to the *lex commissoria* of Roman law.

[39] 2 Planiol, op. cit. n. 1337.

[40] Maury, Notion D'Equivalence, 1920, 31.

[41] 2 Capitant, Cours de Droit Civil (1924) 299; Capitant, De La Cause Des Obligations (1927)30 (citing Domat who is considered as the father of the modern doctrine of cause); Lorenzen, Causa and Consideration in the Law of Contracts (1919) 28 Yale L.J. 621.

underlying theory, or the notion of *cause* is employed,[42] or the case is treated simply as if the *force majeure* has prevented performance by the defendant.[43]

2 *La Théorie de l'Imprévision*

Litigation resulting from the effects of the First World War led some scholars to propound as a true principle a *théorie de l'imprévision* , a doctrine of unpredictable circumstances,[44] with the 1915 decision of the justification of the tailor's dismisal advanced as constituting a useful and appropriate legal principle.[45] Theorists drew on canonist writings and the requirement of good faith,[46] and an inference of a *clausela nebus sic stantibus* from Roman law.[47]

By this theory the courts might, in appropriate cases, vary the contents of a contract in view of unexpected and far-reaching changes in circumstances. "It (*l'imprévision*) implies that the obligor has not foreseen the occurrence of an event, whatever be its nature, which renders performance of the contract either absolutely impossible or very burdensome."[48] The theory reflects the expression in *Taylor v Caldwell* [49] as to an implied condition excusing performance where parties contracted on the basis of the continued existence of a subject-matter which perishes without default of the contractor.

It appears that French courts have been, and are, as chary as their English counterparts of the defence of supervening events, so that an obstacle to

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[42] Ceccaldi v Albertini, Cass. Civ., 14th April 1891, D. 1891 I. 329. Fornier v Gros, Cass. Civ., 5th May 1920, S. 1921 I. 298.

[43] As illustrative, Cremieux et Cie v Cipriotti, Trib. Seine, 20th January 1915, S. 1916 II.

[44] Bruzin, La Notion d'Imprévision, 1922, 22; Magnan de Bornier, Essai sur la Théorie de l'Imprévision, 1924.

[45] Estève v Dubois et Lacoste, Trib. Toulouse, 1st June. 1915, D. 1916 II. 112, s. 1916 II. 29; referred to above as having been subject to criticisms that it was without legal basis referred to above as having been subject to criticisms that it was without legal basis.

[46] Bruzin, La Notion d'Imprévision, and Magnan de Bornier, Essai sur la Théorie de l'Imprévision.

[47] M.D. Aubrey: Frustration Reconsidered - Some Comparative Aspects. (1963) 12 I.C.L.Q. 1165. This latter doctrine made the validity of a contract depend on the continuance of the circumstances existing at the time of its formation, and can be traced through the Middle Ages from the Glossators up to Grotius and into the Prussian General Land Law of 1794. It started with the proposition that in general one may not refuse to perform a contract "on the ground of altered circumstances" but added that if, however, an unforeseen change of circumstances makes it impossible to achieve the aim of both parties as expressed in the contract or inferable from the nature of the transaction, then each of them may resile from the unperformed contract.

[48] Zaki, L'Imprévision en Droit Anglais, 1930, 186.

[49] (1863) 3 B & S. 826 at 833.

performance releases a party only if it renders it impossible to perform the contract for its duration. What is impossible however is a matter of fact in the individual case. Against this attitude writers advanced, historically, a variety of routes in attempts to widen the impact of a change of circumstances. The movement by the *Conseil d'Etat* in respect of public works' contracts did not affect the *Cour de Cassation*, and it remains settled there that the conditions attaching to *force majeure* must be satisfied in order to justify relief from the obligation, by *résolution* or *résiliation*.

Legislative intervention in 1918 gave the courts power to rescind pre-war contracts,[50] and a law of April 1949 similarly provided for pre-Second World War contracts.[51] Other suggestions were to expand *force majeure* to include mere difficulties of performance, or to reduce the scope of liability for non-performance by use of Article 1150 of the Code Civil.[52] Probable intention of the parties under Article 1156 was also a proposed route for adapting contracts to altered circumstances.[53] Lower courts sometimes embarked on these ventures but the *Cour de Cassation* held its view, and as a principle of private law *la théorie de l'imprevision* was firmly rejected by the civil courts.

The *Cour de Cassation* maintains the premise that parties to a contract are bound to perform the obligations undertaken by them even if with lapse of

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[50] By Loi Fallot, 24 January 1918, a party to a commercial contract became entitled to terminate it if it could be established that the War had produced an unforeseeable rise in costs.

[51] Another historical effect of war was the adaptation of a principle that where an event of *force majeure* prevented performance of an obligation only partially, "*resolution*" may be denied, and a proportional diminution allowed in the performance promised in return. Extension of this principle to deny *resolution* where the obstacle to performance was only temporary led to what became known as the theory of suspension. This theory reached fruition through the pressures of the First World War. The effort to sustain a contract in the presence of *force majeure* of only a temporary nature went back to before the Franco-Prussian war of 1870. Courts, in some of the earliest cases, allowed a suspension under such circumstances through a finding of intention. The theory of suspension started during the outset of the war of 1870, but, with its end and a more normal economic life, the Cour de Cassation decided against it. With the exception of a few apparent applications of this notion, the law so remained until the period of the First World War. With the firm stand taken by the Cour de Cassation, cases that arose during the war period showed efforts on the part of lower courts again to support their decisions by a finding of intention. With cases on the effects of this war increasing the Cour de Cassation asserted that a contract is not necessarily destroyed by temporary impossibility of performance.
The theory of suspension was primarily applied to contracts for so-called "successive" performance, such as contracts of employment and leases.

[52] Article 1150: *"Le débiteur n'est tenu que des dommages et intérêts qui ont été prévus ou qu'on a pu prévoir lors du contrat, lorsque ce n'est point par sou dol que l'obligation n'est point exécutée."* [The *debiteur* is liable only for the damages foreseen or which could have been foreseen at the time of contract, provided it is not as a result of his *dol* that the obligation is not performed.]

[53] Wahl, note to Civ. 4th August 1915, S. 1916/17. 1.17.

time the terms may have come to appear unreasonable. It is for the parties to provide in their contracts for such events. The courts have no power to vary terms; so that, except in a case of *force majeure* proper, a party must fulfil his obligations whatever the consequences for him, and he cannot successfully argue that a change in circumstances has destroyed the significance or identity of the contract.

This view was taken in the mid-nineteenth century, and such was the conclusion in the *Canal of Craponne* case where the company operating a canal had undertaken in 1560 to irrigate the defendant's orchards for a fixed annual sum which, over three centuries, had become absurdly low. At first instance, and on appeal, the decisions referred to *équité* and permitted an increase in the sum to enable the canal company to avoid operating at a loss. The *Cour de Cassation* quashed these decisions and emphatically pronounced that courts must never use lapse of time or other circumstances to modify agreements of parties or substitute new clauses for those freely accepted by them.[54] It was in the *Conseil d'Etat* that willingness to adopt contracts to changed circumstances was shown, and, within the scope of public law, propositions similar to the *théorie de l'imprévision* were used as a mechanism to relieve from the economic upheaval of the First World War.[55]

Construction contracts for public works were in the forefront, followed by contracts for public utilities, and the need and reason for this approach was the public interest in their conduct and continuance in new circumstances. In the leading case it enabled a gas company to escape from the fixed prices in its contract made in 1904 to supply gas to Bordeaux over a long period of years.[56] The *Conseil d'Etat* appreciated that fluctuation in costs should have been anticipated, but permitted escape from fixed prices by way of an order remitting the case for adjustment of the prices in default of agreement by the

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[54] Cass. Civ., 6 March 1876 (Syndicat des arrosants de Pélissane v De Gallifet. D. 1876. 1.193 note Giboulet.

[55] The circumstances are comparable to those that afflicted Germany where under private law the BGB provision that "The debtor is obliged to perform in such a manner as good faith requires, regard being had to general practice", ¶¶ 242, was used in the decision of the Reichsgericht in 1923, (RGZ, 107,78,86) during the period of hyperinflation to regularise mortgages in terms of their value at the time of their creation.

[56] Cie. Générale d'Eclairage de Bordeaux v Ville de Bordeaux. Conseil D'Etat, 30 March 1916; S.1916 3.17.

parties, because the greatly increased cost of coal resulting from the war exceeded the outer limits of the increases that could have been contemplated by the parties when the contract was made. It is of significance that non-performance was not in issue with no question raised as to discharge, and, particularly, that the court required the gas company had to bear that portion of the onerous consequences resulting from *force majeure* which a reasonable interpretation of the contract would leave them to bear.

This is an important aspect of the different regime applicable to public works where the *theorie*, sometimes termed *sujétions imprévues* , may be applied. It is particularly so in respect of unforeseeable ground or soil conditions, where the *théorie* may relieve from the principle of the contractor bearing the risk.[57]

3 Impossibility

Every system of law has the task of defining the consequences of a contract becoming impossible to fulfil because of some external supervening event for which neither party is responsible. That such eventuality releases both parties from further performance of any of the stipulations in the contract is a common denominator. The civil law attitude that impossibility excused performance of a contract is derived from the Roman law concept that it operated to extinguish the obligation itself.[58]

Where the contract was plainly on its face, for an impossibility in the nature of things, it was regarded as void on the imposed or derived ground that it cannot have been seriously meant under the rule *impossibilium nulla obligatio est* .[59] This seems to have covered both legal and physical impossibility.[60] By contrast, if performance became impossible after a

[57] The case law of the Conseil d'Etat on the application of this theory to soil risks is old and extremely comprehensive. It has been analysed by Jacques Catz in Les constructeurs et le risques du sol, Editions du Moniteur, 1985. Undoubtedly relief is given where the terms of contracts are not seen as pre-allocating the risk. Referred to by Dr. C. Wiegand in Allocation of the Soil Risk in Construction Contracts: A Legal Comparison, 1989, I.C.L.R., 283.

[58] Possibly illustrating the function of contract as less important than that shown by the approach of common law whereby the question is posed in the context of the rights and obligations which the parties have created by their agreement; J. J. Gow: Some Observations on Frustration, 1954, 3 ICLQ 291.

[59] Digest. 30. 104.1.

[60] Digest. 50. 17. 185;

stipulatio was made, without fault on the part of the promissor, then the supervening impossibility, *casus*, released the party bound from liability to perform.[61]

The Roman distinction is carried into French law, so that the rules within Articles 1147 and 1148 for determining whether an obstacle to performance amounts to a *cause étrangére*, whether *force majeure* or *cas fortuit*, freeing the obligor from liability for damages, are not applicable to contracts which never could be performed at all. These rules serve a separate purpose, covering those circumstances constituting a subsequent impossibility, with the result that where it cannot be shown that the non-performance is the result of a *cause étrangère* , there is an available claim for damages, even though not for performance.

Impossibility as a rubric appeared relatively late in English law in historical terms,[62] and when the impossibility is unknown the essentials of a contract may be regarded as lacking,[63] or, if known, nullity may be based on mistake.[64] Equally in France the requirements for a legally binding contract cover much of the ground that relates to impossibility at the time of contracting, and consideration of *cause* is material, deriving from the premise that an obligation without a *cause* or with a mistaken cause can have no effect.[65]

The Code Civil identified grounds for annulment or dissolution in that the loss, destruction, or removal from commercial use of the subject matter of the contract annulled the obligation,[66] and the death of the tradesman, architect or contractor dissolved the contract for the hire of services,[67] but the scope of the provision in Article 1134 was not limited to those circumstances

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61 Digest. 12.7.1.2.

62 The description in the first edition of a leading textbook would have been well understood by a civil lawyer, namely: "Where an absolute impossibility of performance exists at the time of making the agreement the general rule seems to be that there is no contract", Leake on Contracts, First Edition, 1867 p. 358.

63 Taylor v Caldwell (1863) 3 B & S. 826.

64 Bell v Lever Bros. (1932) A.C. 161 (H.L.)

65 Article 1131.

66 Expropriation is an example of the latter.

67 Article 1795: *"Le contrat de louage d'ouvrage est dissous par la mort de l'ouvrier, de l'architecte ou entrepreneur"* [A building contract is dissolved by the death of the tradesman, of the architect or of the contractor.]

that rendered contracts a nullity, nor as to what would be allowed by law. Similarly in England the liability of a person to perform personal obligations ceases with his death, the contract having been rendered impossible, and equally where personal confidence was relevant.[68] The employment of a tradesman or contractor may be personal in that his personal representitives cannot perform his obligations and the position would be the same, but the point does not normally apply to the death of the employer.[69]

In contrast to the civil law and the release of a party whose performance became impossible without fault or fraud, development under common law started from the parties' presumption of possibility as the basis of the contract. Its premise, that "When the party by his own conduct creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract,"[70] was later ameliorated by the mechanism, where appropriate, of an assumption by way of implied condition.[71] Whilst the judgment in *Taylor v Caldwell* cited the derivation of the civil law, the result that moulded the common law was not that the obligation was a nullity, but one which the parties must have contemplated as not having intended. This exemplifies the ability of the common law to graft a self-satisfying reason onto a civil law solution,[72] and illustrates a difference between a civil law approach which favours recourse to rules, and common law which derives the consequences from the supposed will of the contracting parties.

Actual physical impossibility of performing the contract, by whatever means

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[68] This would ordinarily apply to an architect, his death bringing the contract to an end; Stubbs v Holywell Railway (1867) L.R. 2 Ex. 311.

[69] Davison v Reeves (1892) 6 T.L.R. 39; this was the employment of a civil engineer by a contractor.

[70] Paradine v Jane (1647) Aleyn 27.

[71] "Where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burdensome, or even impossible ..." but, "... where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor", Taylor v Caldwell (1863) 3 B & S 826, Blackburn J. at p. 833.

[72] B. Nicholas. Rules and Terms - Civil Law and Common Law. (1973-4) Tulane L. Rev Vol. 48. p.946.

could be employed, which exists at the time of entering into the contract will under English law excuse non-performance. This is very much subject to express terms for there is no excuse where the party charged expressly or impliedly warrants the possibility of the work.[73] A contractor was liable where he had positively agreed to erect certain works including such alterations to them as might be required within a certain time and failed.[74] Argued within a few years of *Taylor v Caldwell* , the contractor had contended on the basis of an implication that it was impossible for a man to bind himself so as to exclude a condition that it must be possible to do the work contracted for within the time. Yet the impossibility was the creature of the very term of the contract, and such implication would have been at variance with it.[75]

The impossibility may also be imposed by some subsequent outside compelling force. Each party must fulfil his obligations up to that point for the contract is not avoided by becoming impossible of fulfilment, but the duty of further performance ceases.

Impossibility as a term appears in FIDIC in respect of the contractor's obligation: "Unless it is legally or physically impossible, the Contractor shall execute and complete the Works ...".[76] Physical impossibility would be difficult to raise where the contractor's methods were unconstrained, but the application of the same phrase in *Turriff v Welsh National Water Development Authority*[77] gave rise to a construction that mirrors the French attitude on the intervention of *force majeure* . Absolute impossibility according to the laws of nature was rejected, and the preferred conclusion was physical impossibility within the confines of the contract with the

[73] Clifford (Lord) v Watts (1870) L.R. 5 C.P. 577.

[74] Jones v St. John's College, Oxford (1871) Law Times Reports 803.

[75] "Certainly if he does in direct terms enter into a contract to perform an impossibility, subject to a penalty, he will not be excused because it is an impossibility.", per Hannen J.

[76] FIDIC, 4th Edition, Clause 13.1: "Unless it is legally or physically impossible, the Contractor shall execute and complete the Works and remedy any defects therein in strict accordance with the Contract to the satisfaction of the Engineer ...". The provision derives from the ICE Conditions.

[77] Turriff Ltd. v The Welsh National Water Development Authority, McCreath Taylor & Co. Ltd. and Trocoll Industries Ltd. (1979), now reported in (1994) Constr. Law Yearbook 122. The work required pre-cast concrete segments of a specific tolerance "impossible in normal commercial manufacturing terms". The judge held that "It was not, plainly, absolutely impossible to manufacture the units to the required dimensions and tolerance, but in the ordinary competitive commercial sense, which the parties plainly intended, I am satisfied that it was quite impossible ... to achieve the degree of dimensional accuracy required" and so the contractor was not bound to complete those parts of the work.

required performance being that in accordance with the drawings and specification.

Legal impossibity would involve some statutory prohibition or interference that would be likely in any event to represent *force majeure* under French law. Again within a few years of *Taylor v Caldwell* it was held in the case of legislation that a defendant was discharged from a covenant by a subsequent Act of Parliament which compelled him to assign to a railway company, and so put it out of his power to perform.[78] The reasoning was that the law will not enforce the fulfilment of a contract where the legislature has introduced substantial and indefinite limitations which the parties cannot be held to have contemplated when making the contract.[79]

At the point of a contract being impossible to fulfil the law has a choice, either to provide no redress for the consequences leaving the parties where they stood at the time of the event with loss or gain lying where it falls, or to make an attempt at some equitable adjustment between the parties to restore them so far as possible to their pre-contract positions, so lessening the consequences of the contract having proved abortive. This alternative of restitution is a separate principle and independent of contract.[80] The English courts left the parties where they stood. Conjecturing what the parties might be assumed to have agreed upon if they had contemplated the unforeseen event was seen as illogical, and impracticable as a mechanism for relief. The development from *Taylor v Caldwell* did nothing more than effect a release

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[78] Baily v de Crespigny (1869) L.R. 4 Q.B. 180; on the principle that *lex non cogit ad impossibilia*.

[79] "There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promissor. But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens.", Hannen J. at p. 185.

[80] Stated in its broadest terms by Pufendorf in his Law of Nations, first published in 1672: "When the thing at the time of making the promise or pact appeared possible and afterwards becomes impossible, we must enquire whether ths happened by mere chance, or by default and deceit. In the former case the pact is disannulled,if nothing has yet been performed on either side. If anything have already been done, towards it by one of the parties, the other shall give it back, or pay to the value of it; if neither of these can be done he is to use his best endeavours, that the man be not the loser by him. For in contracts, the first regard is had to the thing expressly mentioned in the agreement; when this cannot be obtained, it is sufficient to give the equivalent; but whatever happpens, all imaginable care is to be used, that the other party suffer no prejudice", Book 111, ch. 7, s.3. English Translation, (1703) 225.

from future performance, and it did not overcome the inability of one party to recover what he had laid out against a performance of the other by the time the impossibility intervened.

That common law proposition, derived from one of the Coronation cases,[81] was identified in the Scottish *Cantiare San Rocco* case[82] as an explanation, but no justification, for the divergence between English law and the practice of "all nations of the trading world with the exception of England". To the forthright comment on the isolation of English law was added:[83]

> "the rule, admitted to be arbitrary, is adopted because of the difficulty, nay the apparent impossibility of reaching a solution of perfection. Thereafter, leave things alone: *potior est conditio possidentis* . That maxim works well enough among tricksters, gamblers, and thieves; let it be applied to circumstances of supervenient mishap arising from causes outside the volition of the parties: under this application innocent loss may and must be secured at his expense to the other party. That is part of the law of England...",

but not so civil law, together with the prophecy that this chapter of the law would fall to be reconsidered.

That remained until 1943 when, first, the courts changed the position.[84] The basis for overuling *Chandler v Webster* was that whilst there is distinction between a contract being wiped out altogether, so destroying the promises *ab*

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[81] Chandler v Webster (1904) I K.B. 493. The conclusion in the Coronation cases was that as the contract could not be rescinded *ab initio* the loss must lie where it fell; whilst liability for payments due in the future was annulled deposits paid in respect of seats hired could not be recovered and there was liability for instalments due but unpaid when the circumstances of the King's illness put an end to the contract on the basis that one from whom there was due payment at that time should not be better off than if he had paid.

[82] Cantiare San Rocco S.A. v Clyde Shipbuilding and Engineering Co. Ltd. (1924) A.C. 226 (H.L.), "Where, from causes outside the volition of the parties, something which was the basis of, or essential to the fulfilment of, the contract, has become impossible, so that, from the time when the fact of that impossibility has been ascertained, the contract can no further be performed by either party, it remains a perfectly good contract up to that point, and everything previously done in pursuance of it must be treated as rightly done, but the parties are both discharged from further performance of it. If the effect were that the contract were wiped out altogether, no doubt the result would be that money paid under it would have to be repaid as on a failure of consideration. But that is not the effect of the doctrine; it only releases the parties from further performance of the contract. Therefore the doctrine of failure of consideration does not apply. The rule adopted by the Courts in such cases is I think to some extent an arbitrary one, the reason for its adoption being that it is really impossible in such cases to work out with any certainty what the rights of the parties in the event which has happened should be. Time has elapsed, and the position of both parties may have been more or less altered, and it is impossible to adjust or ascertain the rights of the parties with exactitude. That being so, the law treats everything that has already been done in pursuance of the contract as validly done, but relieves the parties of further responsibility under it."

[83] Lord Shaw (1924) A.C. 226 at p.259.

[84] Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd. (1943) A.C. 32 (H.L.). The decision was given on 16th June 1943.

initio, and cases in which supervening impossibility only releases the parties from future performance, a claim for recovery back of money paid under the doctrine of total failure of consideration applies where the contract remains perfectly good up to the time of the supervening impossibility. The claim for recovery of money paid for a consideration which has failed is a remedy in restitution for unjust enrichment, and what brings about this facility to recover is a failure in contract performance and not consideration, in the sense in which the word is used when it is said that in executory contracts the promise of one party is consideration for the promise of the other.[85]

This would have alleviated the harshness of the rule only in some instances of prepayment but could not be regarded as dealing fairly between parties generally, as the recipient who had to return the money would be disadvantaged where greater expense had been incurred in partially carrying out of the work than the prepayment. The *Fibrosa* decision left the question of equitable apportionment to the legislature and the second change in 1943.[86]

The civil law had derived from Roman law the ability for the promisee to recover what he had paid, a *condictio causa data causa non secuta* ,[87] to prevent an unjust result even though he could not compel counter performance. The *condictio* was a remedy for unjust enrichment, separate from notions of good faith, and illustrated by the *Cantiare San Rocco* case,[88] where, under an agreement to supply marine engines between Austrian and Scottish companies, performance became impossible on the outbreak of war. It was held under Scots law that the deposit of the Austrian purchasers paid

[85] "In English law, an enforceable contract may be formed by an exchange of a promise for a promise .... and thus, in the law relating to the formation of contract, the promise to do a thing may often be the consideration, but when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise, The money was paid to secure performance and,if performance fails the inducement which brought about the payment is not fulfilled." per Viscount Simon at p.48. Lord Wright, from p. 61, traced the history and use of restitution in English law.

[86] Law Reform (Frustated Contracts) Act 1943. The Act passed into law on 5th August 1943.

[87] Translated as: "Action to recover something given for a consideration which has failed" per the Earl of Birkenhead at p. 235.

[88] (1924) A.C. 226 (H.L.). It is argued that this would not have been a true case of *condictio* under Roman law which would have treated the contract under rules of voidness, *emptio venditio* , Buckland and McNair, Roman law and Common Law, (1965) 2nd ed. The facts were though that several weeks work had been involved, and necessarily so because of the nature of the design engineering required before any tangible product could result. It must be unlikely that Roman law had to address similar facts, but even if the argument is sound the case represents a useful illustration of civil law development.

on contracting had to be repaid. They had received nothing, and although between the contract date in May 1914 and the declaration of war in August plans had been prepared and materials ordered nothing had been built.

The House of Lords invoked the principle of the *condictio* , that a person having received property from another and by reason of circumstances existing at the time or arising afterwards, it was or became contrary to honesty and fair dealing for the recipient to retain it, citing with approval an earlier exposition:[89]

> "The general principles of law applicable to the contract of affreightment are not essentially different from those applicable to other similar contracts, such as contracts of land carriage, or building contracts, or any others, in which one party agrees to pay a certain price as the return for materials furnished or work done, or services rendered by the other party ... There is no rule of the civil law, as adopted into all modern municipal codes and systems, better understood than this - that if money is advanced by one party to a mutal contract, on the condition and stipulation that something shall be afterwards paid or performed by the other party, and the latter party fails in performing his part of the contract, the former is entitled to repayment of his advance, on the ground of failure of consideration. In the Roman system the demand for repayment took the form of a *condictio causa data causa non secuta* , or a *condictio sine causa* , or a *condictio indebiti* , according to the particular circumstances. In our own practice these remedies are represented by the action of restitution and the action of repetition. And in all systems of jurisprudence there must be similar remedies, for the rule which they are intended to enforce is of universal application in mutual contracts.
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> "If a person contracts to build me a house, and stipulates that I shall advance him a certain portion of the price before he begins to bring his materials to the ground, or to perform any part of the work, the money so advanced may certainly be recovered back if he never performs any part or any available part, of his contract. No doubt, if he performs a part and then fail completing the contract, I shall be bound in equity to allow him credit to the extent to which I am *lucratus* by his materials and labour, but no further; and if I am not *lucratus* at all, I shall be entitled to repetition of the whole advance, however great his expenditure and consequent loss may have been".

[89] From Lord President Inglis in Watson & Co. v Shankland (1917) 1 S.L.T. 297.

Apart from restitution of benefits conferred an aspect also arises under French law as to mutuality of release, and it is in this respect that the doctrine of *cause* is material. Equally important, and practically more so, is *jurisprudence* and the application of Article 1184 which provides for the *résolution* of the contract by the court itself in cases of non-performance.[90] Whilst this permits an award of damages where appropriate in addition to *résolution* , suggesting its ambit relates only to those cases where the non-performance derives from default, the courts have not treated this as a limitation. The effect is that as a result of a supervening event the court has a discretion to award rescission of the contract, and as an addition to restitution that appears as a balancing of the respective interests of the parties consequent on the circumstances of that event.

The use of Article 1184 in cases other than default is contrary it seems to views of writers on *doctrine* , but the terms of the Article do fit with the approach of the courts, apart from the reference to damages, but even that reference is permissive in the sense that it is always a matter for the court's discretion. The justification is at the commencement of the Article, "... *le cas où l'une des deux parties ne satisfera point à son engagement* " [where one of the two parties does not fulfil his obligation], without reference to the circumstances bringing that about.

4 *Cause*

Whilst Germany adopted the Roman law principle both for pre-existing and for subsequent impossibility,[91] the French Code Civil has no corresponding statement, although Article 1172 pre-supposes the rule *impossibilium nulla obligatio est* in its provision that every condition providing for an impossibility is void and nullifies the agreement which depends on it. More than one route exists however to reach the conclusion that a contract for an impossibility is not valid, even without release of one party from his obligation through the impact of *force majeure* on the other.

[90] Referred to further under Termination.

[91] BGB §§ 306, and 275.

The doctrine of *cause* gives effect to the idea that a legally binding force cannot attach to a promise without taking account of the reason why it was made and the purpose of the promisor. A lawful *cause* is essential for a valid agreement, though it need not be expressed, and an obligation which is not supported by a *cause*, as with a false or unlawful *cause*, is devoid of efficacy.[92] The premise, in circumstances where one party will not obtain the result contracted for because performance by the other has become impossible, is that performance is then excused under the doctrine of *cause*. This covers territory of common law frustration. It also covers circumstances where an English lawyer would speak of failure of consideration, but without aligning *cause* to consideration under English law, for French law does not require such a criterion to determine whether promises are legally binding. Further, within the doctrine of *cause* when a party is excused from performance he may recover back what he has given if he does not receive what was intended from the other party. A total failure of consideration is not necessary for this result, the deciding factor being whether the contract would have been entered into if the situation that has arisen had been anticipated at the time the contract was made.

The obligation depends on the *cause* for its existence and in the realisation of the *cause*, and it is in the consequences of this that the effects of impossibility have been postulated.[93] Inter-dependence of the obligations in bilateral contracts is embodied in the doctrine of *cause*, and this answers the point on release: as each obligation is the *cause* of the other so as one disappears through *force majeure* so does the other. Under the *théorie des risques* the obligor whose obligation has ceased by *force majeure* is not liable for non-

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92 Articles 1108, 1132 and 1131.

93 As described by Capitant in his work *De la Cause des Obligations;*" (1) If one of the parties to the contract demands performance of the obligation which the other has undertaken, he must show that such performance will not have a result contrary to the end which the obligee had in mind when he undertook to perform. That is he must show that his end has already been realised, because he has fulfilled his undertaking or is about to be realised, because he is ready to fulfil his undertaking. (2) If by the occurrence of some event subsequent to the birth of the obligation (e.g., impossibility, *vis major*, failure by the other party), the end sought by the debtor cannot be realised, the debtor ceases to be bound, he is freed. The obligation necessarily disappears with its *cause*. It is not equitable that a promise should keep its obligatory force when it can no longer lead to the end envisaged by the promisor. The means is only valid so long as it leads to its end, if it cannot do that then it should have no effect. This principle is of great importance in mutual contracts, for in such contracts each party binds himself in order to obtain fulfilment of the promise given him in exchange. If, for example, *vis major* prevents that performance, then his own obligation ceases to have a *cause*, and he should be freed from it, either as of right, or by demanding rescission of the contract and restitution of what he has given." 3rd edition (1927).

performance but equally he cannot claim performance from the other party, although where the other party has already performed then he will have to make restitution. In this way *doctrine* would give rise to nullity without the need for a claim for *résolution* and the required order of the court. Nevertheless, *jurisprudence* as to the use of the courts' ability to order *résolution* under Article 1184, where the non-performance does not derive from default, appears established,[94] despite a leading decision justifying its application in terms of *cause*:

> "... this Article does not distinguish between the reasons for non-performance of agreements, and does not render *force majeure* an obstacle to rescission, in the case where one of the two parties does not fulfil his obligation; so in fact, in a synallagmatic contract, the obligation of one of the parties has as its *cause* the obligation of the other and vice versa, so that, if the obligation of one is not fufilled, for whatever reason, the obligation of the other becomes without *cause*."[95]

5 Frustration

The divergence between English law and civil law in respect of recoverability where frustration occurred was removed by the Fibrosa case;[96] and frustration could operate retroactively to permit a party to recover what he had paid in performance of it, provided he could avail himself of a total failure of consideration. The Law Reform (Frustrated Contracts) Act 1943 then abrogated the need for total failure of consideration.

The Act applies both where a contract has become impossible of performance, or where it has been "otherwise frustrated", and the parties have been discharged from further performance. The recovery of sums paid and payable before the time of discharge creates the like result as in the French doctrine of *cause*. Unlike the result in the *Cantiare San Rocco* case, that

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[94] Referred to under *Résolution*.

[95] Cas. civ. 14. 4. 1891, S. 1894.1.391, D. 1891.1.329, note Planiol; "... cet article ne distingue pas entre les causes d'inexécution des conventions, et n'admet pas la force majeure comme faisant obstacle à la resolution, pour le cas où l'unedes deux parties ne satisfait pas à son engagement; qu'en effet, dans un contract synallagmatique, l'obligation de l'une des parties a pour cause l'obligation de l'autre et réciproquement, en sorte que, si l'obligation de l'une n'est pas remplie, quel qu'en sit le motif, l'obligation de l'autre devient sans cause." Kahn-Freund, A Source-Book on French Law, (1991) p. 479.

[96] Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd. (1943) A.C. 32 (H.L.).

contractor now, if in England, would be entitled to recover such expenses incurred on the preparation of plans and ordering materials, and he would also be able to invoke the power to include overhead expenses in respect of such work or services performed.[97]

The receipt by one party of a valuable benefit before the time of discharge, other than money, gives the other party an ability to recover a just sum, not exceeding that value, in all the circumstances which include the expense incurred by the benefited party in performance and also the effect in relation to the benefit of those circumstances giving rise ot the frustration.[98]

The principle of frustration as developed in English law has been entwined with a variety of mechanisms by which the courts have regarded that end as reached, and at least five theories have been advanced at different times for the jurisprudential foundation of the doctrine.[99] Frustration is in reality represented by a jurisdiction which the courts will apply in certain limited circumstances to reach a decision that contractual obligations, which on their face appear to be binding, are no longer enforceable between the parties. The description of the circumstances that justify its application, and consequently the decision whether those circumstances exist in a particular case, are questions of law.

The implied term route was expressed in terms that: "no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted."[100] The essence of frustration though is the dissolution of obligations because of the supervention of the unexpected and unforeseen, and so analysis of the will or hypothetical expectations of the parties is unsatisfactory, just as is the imposition of the view of the reasonable man. The formulation in *Davis Contractors v Fareham* is regarded as "the classic statement of the doctrine".[101]

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[97] By virtue of the proviso to section 1(2) of the 1943 Act, and the power under section 1(4).

[98] Section 1(5). Such sum may include interest under the statutory discretionary power from any date after the frustration of the contract; B.P. Exploration Co. (Libya) Ltd v Hunt (1983) 2 A.C. 352 (H.L.).

[99] Lord Roskill in National Carriers Ltd v Panalpina (Northern) Ltd (1981) A.C. 675 at 717 (H.L.).

[100] F. A. Tamplin Steamship Co. Ltd. v Anglo-Mexican Petroleum Co. Ltd. (1916) 2 A.C. 397, at 403.

[101] Wates v G.L.C. (1983) 25 B.L.R. 1 at 27 (C.A.).

Frustration,[102]

> "occurs wherever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni* [it was not this that I promised to do]. This imposition of the law's recognition as distinct from suppositions as to what answers the parties would have given to questions which, necessary to the inquiry, they would never have asked is because the decision must be given "irrespective of the individuals concerned, their temperaments and failings, their interest and circumstance[103]". The legal effect of frustration "does not depend on their intention or their opinions, or even knowledge as to the event"[104]."

As to whether a contract has been frustrated, "the data for decision are, on the one hand, the terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred."[105] It is by virtue of this enquiry that the scope for the application of the doctrine of frustration to construction contracts is in practice limited. Performance will inevitably, as a matter of reasonable foresight, involve uncertainty and physical difficulty. Further, the parties will frequently have expressly allocated the risk of such events as might otherwise be treated as frustrating events, even without the premise that an employer does not impliedly warrant that plans or methods specified by him are practicable.[106]

Nevertheless similarity exists between events that might result in frustration and those producing relief by *force majeure* under Article 1148, simply because of the nature of events that may so affect construction work and fall within the character required. One senses that relief by way of *force majeure*

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[102] Davis Contractors Ltd v Fareham Urban District Council (1956) A.C. 696 (H.L.), per Lord Radcliffe at 729.

[103] Ho Hinji Mulji v Cheong Yue Steamship Co Ltd (1926) A.C. 497, at 509 and 510.

[104] Ho Hinji Mulji v Cheong Yue Steamship Co Ltd. (1926) A.C. 497, at 510.

[105] Lord Wright in Denny, Mott & Dickinson Ltd. v James B. Fraser & Co Ltd. (1944) A.C. 265 (H.L.) 274. Further: "In the nature of things there is often no room for any elaborate inquiry. The court must act upon a general impression of what its rule requires. It is for this reason that special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would if performed, be a different thing from that contracted for.", Davis Contractors Ltd. v Fareham Urban District Council (1956) A.C. 696 at 729 (H.L.).

[106] Thorn v London Corporation (1876) 1 App. Cas. 120.

under French law is a substantially lesser hurdle than satisfying the doctrine of frustration in England. This may be a reflection first of the innate caution with which English courts approach frustration,[107] and second, that the decision in France as to whether a material obstacle has arisen rendering performance impossible is one of fact at first instance, so that the reproduction of approved phrases of the *Cour de Cassation* whilst affirming that the obstacle was truly insurmountable achieves an unappealable result.[108]

The investigation of frustration in England will always involve a question of law on the true construction of the contract as a starting point: whether its terms properly construed apply to the new situation:

> "If, ... a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point - not because the court in its direction thinks it just and reasonable to qualify the terms of the contract, but because in its true construction it does not apply in that situation."[109]

Where contractors in July 1914 entered into a contract to construct reservoirs to be completed within six years, there was a term by which the engineer had power to extend the time if in his opinion the contractors were unduly delayed or impeded for reasons including any "difficulties, impediments, obstructions, opposition ... whatsoever and howsoever occasioned." The works commenced but were prevented from proceeding in 1916 under Defence of the Realm legislation. The employer claimed a declaration that

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[107] In reality it is a rarity. "Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended", per Bingham L.J. in J. Lauritzen A.S. v Wijsmuller B.V (The "Super Servant Two") (1990) 1 Lloyd's Rep. 1 at p.8, described by him as a proposition established by the highest authority and not open to question.

[108] David: English law and French law p. 121.

[109] British Movietonews Ltd. v London and District Cinemas Ltd (1952) A.C. 166, per Viscount Simon at 185. This was adopted by Lord Reid in Davis Contractors Ltd. v Fareham U.D.C. (1956) A.C. 696 where the contract made in 1946 was for the construction of 78 houses at a fixed price in eight months, with an obligation to complete 40 in six months and a further 30 within 7 months. Serious shortages of labour and building materials, found by the arbitrator to be anticipated, led to completion with cessation of work in twenty-two months and at an increased cost approaching twenty per cent. Attached to the contractor's tender had been a letter stating that the tender was subject to adequate supplies of materials and labour being available as and when required. The conclusion reached in the Court of Appeal and upheld in the House of Lords was that the letter was not incorporated into the contract upon which the basis of findings as to changed circumstances from those within the terms of the contract really fall away leading to the conclusion that the gradual effect of the shortages on time and cost did not amount to frustration, and leaving the contractor to bear the risk of loss.

the contract remained binding, but the contractor's defence that it had become impossible and that both parties were released from all further liability was upheld.[110] The extension provision was not construed to cover the case "in which the interruption is of such a character and duration that it vitally and fundamentally changes the conditions of the contract, and could not possibly have been in the contemplation of the parties to the contract when it was made,"[111] but one concerned with more or less temporary difficulties rather than occurrences which would render the contract on resumption very different to that which it was when interrupted. The case was one where the action of Government had been forced on the contractor as a *vis major*,[112] and the judgment in *Baily v De Crespigny* in respect of impossibility through illegality was adopted.[113]

For the purposes of the 1943 Act the time of discharge is material, and the identification of this is a necessary part of a conclusion as to frustration.[114] The factual necessity to wait and see does not prevent the doctrine being invoked[115] nor does the fact that the parties continued with the contract;[116] but in the practical context of construction contracts gradual alteration in circumstances may militate against a finding of frustration which depends "on its occurrence in circumstances as to show it to be inconsistent with the further prosecution of the adventure".[117] However "what the parties say and do is only evidence, and not necessarily weighty evidence, of the view to be taken of the event informed and experienced minds".[118]

Fire falls within the range of risks frequently allocated expressly by the

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[110] Metropolitan Water Board v Dick, Kerr and Co. Ltd. (1918) A.C. 119.

[111] Lord Finlay L.C. at p. 126.

[112] Lord Dunedin at p. 128 and p. 130. Apart from the point that an interruption might be so long as to destroy the identity of the work or service, with the delay upon the Minister's order being indefinite, that order required compliance with the Ministry's instructions as to the disposal of plant and labour, and this, separate from the delay, was regarded as preventing the contract being the same as it ever was.

[113] (1869) L.R. 4 Q. B.180; considered under Impossibility, above.

[114] The common law approach of construing the contract terms to determine whether the event falls outside its provisions, is incorporated into the Act by section 2 (3) requiring the court to give effect to provisions intended to have effect in the event of the circumstances arising which would otherwise frustrate the contract. The Act only has effect consistent with such provisions.

[115] Pioneer Shipping v B.T.P. Tioxide (The Arena) (1982) A.C. 724 at 752 (H.L.), where the Arbitrator's decision that a charter party was frustrated by delay caused by a strike upheld.

[116] Kissavos Shipping v Empresa Cubana (The Agathon) (1982) 2 Lloyds Rep. 211 (C.A.).

[117] Lord Wright in Denny, Mott and Dickson Ltd v James B. Fraser & Co. Ltd. (1944) A.C. 265 at 276.

[118] Lord Sumner in Ho Hinji Mulji v Cheong Yue Steamship Co Ltd (1926) A.C.497 at 509.

parties, for where a contractor undertakes to complete a whole work for a price and the works are destroyed by fire, flood or the like, he is not, subject to express terms, released from his obligation to complete and normally the contract is not frustrated.[119] Applying the principle exemplified in *Metropolitan Water Board v Dick, Kerr & Co.*,[120] the Privy Council upheld the conclusion that an unforeseeable landslip bringing down a 13-storey block of flats and hundreds of tons of earth on to a site and obliterating works in progress was a frustrating event, despite the term that "... should any unforeseen circumstances beyond the Vendor's control arise ... the Vendor shall be at liberty to rescind the agreement forthwith and to refund ... and upon such recession and upon repayment ... this Agreement shall become null and void as if the same had not been entered into and neither party shall have any claim against the other in respect hereof."[121] The clause was in language wide enough to cover the event, but it was not construed as providing for the particular unforeseen contingency being an event causing the circumstances of performance to be radically different from that undertaken by the contract.

Just as in French law fault may negate the ability to rely on a *cause étrangère*, default in the circumstances leading to the event prevents the law in England from attaching to it the label of frustration. So where a contractor failed to build timeously or act in a manner which would have given rise to a renewal of a licence to continue work under wartime regulations, and in fact deliberately delayed the work in the hope that by doing so its completion would be prevented, he was liable for breach of contract notwithstanding the lack of a licence to continue work.[122] The premise for the result was that: "... it has never been held that a man is entitled to take advantage of circumstances as a frustration of the contract if he has brought those circumstances about himself."[123]

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[119] Appleby v Myers (1867) L.R. C.P. 651 - albeit that on the particular facts the contract was there "frustrated", but without the use of the term.

[120] Metropolitan Water Board v Dick, Kerr & Co Ltd. (1918) A.C. 119.

[121] Wong Lai Ying v Chinachem Investment Co. Ltd. (1979) 13 B.L.R. 81 (P.C.).

[122] Mertens v Home Freeholds Co. (1921) 2 K.B. 526.

[123] Lord Sterndale M.R. at p. 536.

Such result was paralleled in the Italian *Corte de Cassation* in 1986.[124] A builder, having purchased a block of flats which were to be demolished and rebuilt for a price represented by flats for the owner in the new building, faced a prohibition on construction and performance of his contract by housing legislation introduced after the date of contract where no amendment to a master plan was secured. The court did not uphold the builder's reliance on the prohibition as *force majeure* in answer to the owner's claim because of his failure to commence work before the legislation or to apply for an amendment. The non-performance in these respects had the same impact as in *Mertons v Home Freeholds* .[125] The *Corte de Cassatione* categorised the builder's failure as a breach of duty to perform in good faith, being in like terms in Article 1134 of the French Code Civil. The inability to rely on *force majeure* in circumstances transgressing the obligation to perform in good faith extends beyond an inability to invoke the doctrine of frustration where the party relying on it deliberately brought about the state of affairs preventing the fulfilment of the contract.

The term self-induced frustration has been used to describe circumstances not within the essential factor of outside events or extraneously imposed changes which "must have occurred without either the fault or the default of either party to the contract".[126] These circumstances include actual and anticipatory breach of contract. Frustration requires causation between the event and performance, so that where choice is available between alternative modes of performance with one becoming impossible, that choice may cause the impossibility, not the antecedent event. The event must be outside the control of the parties, and it is in this sense that the event must occur without default, blame, or responsibility,[127] and this approaches the scope of the civil law result achieved through use of the obligation of good faith.

The unease with which frustration is approached in England may derive from the operation of having to construe a contract so as to put an end to it.

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[124] San-guedolce v Bisantis & Sculco, Corte di Cassazione, 10th April 1986. No. 2500 (1986) Giur. It. 1986 I. 501.

[125] (1921) 2 K.B. 526.

[126] Lord Branden in Paal Wilson and Co. v Partenrederi Hannah Blumenthal (1983) I.A.C. 854 at 909 (H.L.).

[127] J. Lauritzen A.S. v Wiysmuller B.V. (The "Super Servant Two") (1989) 1 Lloyd's Rep. 148 for Hobhouse J's extensive analysis of "self-induced" frustration, and (C.A.) (1990) 1 Lloyd's Rep. 1.

An approach of construing the contract to exclude frustrating circumstances from the scope of the obligation of the party concerned, so leading to exemption from liability because the obligation does not extend to those circumstances and not because the contract has automatically come to an end, has been suggested as one which would then parallel the position of *force majeure* in French law.[128] However, a proposition to the effect that since a contract as construed does not extend the obligations under it to the circumstances occurring whereby a defendant cannot be liable, does not reflect the view of frustration under English law; rather it identifies the distinction,[129] that whilst *force majeure* in French law is relevant to the exoneration of the obligation of one party, in English law its counterpart relates to termination, bringing "the contract to an end forthwith, without more and automatically".[130]

The ICE Conditions bring the term"frustration" within the confines of the contract: "In the event of the Contract being frustrated whether by war or by any other supervening event which may occur independently of the will of the parties ...".[131] The word "may" suggests an application beyond the true legal sense, although "any other supervening event ... independently of the will of the parties" identifies the common law position. Certainly it is "intended to have effect in the event of circumstances arising which operate, or would but for the said provision operate, to frustrate the contract ..." within section 2(3) of the 1943 Act requiring the court to give effect to it.[132] The FIDIC clause contrasts with this in its use of language of exoneration from the obligation under *force majeure* , and it reflects the the distinction between the principles of frustration and *force majeure* and the potentially wider application of the latter.[133]

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[128] B. Nicholas, Rules and Terms - Civil law and Common law, op. cit.

[129] R. David, les Contrats en droit anglais, 384-5 (1973).

[130] Lord Sumner in Ho Hinji Mulji v Cheong Yue Steamship Co Ltd (1926) A.C.497 at 505.

[131] ICE 6th Edition, Clause 64:"Payment in the event of frustration. In the event of the Contract being frustrated whether by war or by any other supervening event which may occur independently of the will of the parties the sum payable by the Employer to the Contractor in respect of the work executed shall be the same as that which would have been payable under clause 65 (5) if the Contract had been determined by the Employer under clause 65."

[132] Further, by virtue of the term for payment as if the contract had been determined under the War clause, cl. 65, there would be little liklihood of the court having to give effect to section 1 of the Act.

[133] FIDIC, 4th Edition, Clause 66.1: Payment in Event of Release from Performance. If any circumstance outside the control of both parties arises ... which renders it impossible or unlawful for either party to fulfil his contractual obligations, or under the law governing the Contract the parties are released from further performance, then ...".

In the term *force majeure* the French courts were given a symbol for legal excuse, and they have applied it, practically, to any independent event that may result in the prevention of performance of a contractual stipulation. From the general principle that a supervening event of *force majeure* discharges the obligor, the civil courts never adopted *la theorie d'imprévision* employed in the *droit administratif* in cases where the economic purpose underlying the contract is destroyed. Through an implied condition purporting to represent the intention of the parties, the reduction by English courts of the principle of maintaining the rigidity of the contractual relationship despite supervening unforeseen events of whatever nature briefly followed the same pattern. The Coronation cases showed the English courts applying the theory of legal excuse more liberally than would have been acceptable under the doctrine of *force majeure* in France.[134] From this they have retreated leaving the parties to their contracts for the allocation of the risks, save in circumstances that are as unforeseeable as they are exceptional. The objective "disembodiment" of the parties in attempting to determine what they must have intended in respect of events, the nature of which had to be of such unexpected moment as not to be contemplated by their contract, is, however, not required.[135]

[134] Zaki, L'Imprévision en Droit Anglais (1930) 186.

[135] As Lord Radcliffe makes clear in Davis Contractors Ltd. v Fareham U.D.C. in which he cited previous judicial description of it per Lord Watson in Dahl v Nelson (1881) 6 App. Cas. 38, "the meaning of the contract must be taken to be not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view they had made express provision as to their several rights and liabilities in the event of its occurrences.", and then continued: "By this time it might seem that the parties themselves have become so for disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself."

[5] **TIME AND DAMAGES FOR DELAY**

1 Time for Performance

Performance on time involves the identification of the due time for completion, but what that due time is under the circumstances prevailing during the carrying out of works necessitates consideration in practice of contract provisions for an extended time for completion, and their application in particular circumstances. Provisions also address the consequence of delayed performance beyond any contractually extended date.

As a general rule in English law time is not ordinarily of the essence,[1] and the provision of a time for completion coupled with grounds for extension fortifies this. The standard forms give a plethora of circumstances which disentitle an employer from relying on a specified date for completion and which give rise to an extension of time. The significance of the grounds for such extensions is often missed, for the benefit to an employer is in having grounds to grant extensions in circumstances which otherwise would constitute breaches or hindrances by the employer or his agents and negate the ability to rely on the contract date for completion in claiming liquidated damages for delay.[2] The JCT and AFNOR standard forms of contract enable comparison to be made of the particular circumstances where delay in performance is excused, and in a wider sphere of the allocations of risk FIDIC provides a vehicle for examining how the approach of French and English law may differ.

There will under English law always be a due time when the required

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[1] Referred to under Termination.

[2] Peak Construction (Liverpool) Ltd. v McKinney Foundations Ltd. (1971) 69 L.G.R. 1 (C.A.).

performance of works under a construction contract ought to have been completed. The due time will be either that provided by agreement, as to what is or is to become the due time for completion, or that which is interposed as the parties' intent, being the end date of a reasonable time for completion.

2 Damages for Late Completion

The remedy of damages for the non-fulfillment of the obligation to perform within the time specified in the contract is viewed under civil law as an aspect of fault to which in France the rules in Articles 1142 and 1146 apply.[3] There is a point of difference between French law and the position in England for it is not sufficient in France in an action for damages for delay simply to show that performance had become due and was not rendered by the due date. Whilst in England notice may be necessary to identify the due date,[4] in France damages may commence only when the defaulting party has been put into delay, *mise en demeure.*

Article 1146 provides that "Damages are due only when the obligor is in delay in fulfilling his obligation, except, nevertheless, where the thing which he was bound to convey , *donner* , or to do could only be conveyed or done within a certain time which he has allowed to elapse."[5] In order to place the obligor in delay the service of a notice on him is required, and Article 1139 refers to this as by formal notice or other equivalent act.[6]

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[3] Article 1142: *"Toute obligation de faire ou de ne pas faire se résout en dommages et intérêts, en cas d'inexécution de la part du debiteur."* [Any obligation to do or not to do is resolved into damages in the case of *inéxecution* on the part of the *debiteur* .] In Germany BGB ¶¶ 636 and in Italy Codice Civile Articles 1453 - 1458.

[4] Charles Rickards Ltd. v Oppenheim (1950) 1 K.B. 616 (C.A.).

[5] Article 1146: *"Les dommages et intérêts ne sont dus que lorsque le débiteur est en demeure de remplir son obligation, excepté néanmoins lorsque la chose que le débiteur s'était oblige de donner ou de faire ne pouvait être donnée ou faite que dans un certain temps qu'il a laissé passer."*

[6] Article 1139: *"Le débiteur est constitué en demeure, soit par une sommation ou par autre acte équivalent (Loi no. 91-650 du 9 juillet 1991, art.84) < telle une lettre missive lorsqu'il ressort de ses termes une interpellation suffisante, > soit par l'effet de la convention, lorsqu'elle porte que, sans qu'il soit besoin d'acte et par la seule échéance du terme, le débiteur sera en demeure."* The amendment comes into force on the first day of the thirtieth month following the month of its publication (14th July 1991). The *sommation* is the formal notice served by court oficer, *huissier* , but the *autre acte équivalent* is left to the judge's discretion.

There has been division as to what is sufficient,[7] and the 1991 amendment clarifies matters. In commerce an ordinary letter suffices, and even oral communication if of the necessary specific nature. The parties may agree to dispense with the *mise en demeure* , and whilst the Article requires that the contract must contain provision for such exemption, it may be implied.[8]

The purpose of the *mise en demeure* is to make it clear to the party in default that he is required to perform, and significantly, failure to serve raises a presumption of acquiescence in the delay. The giving of the notice may also assist in satisfying any requirement of fault where such ingredient is to be relied on. To be effective it must follow the time when the performance has become due, but it also requires the party not in default to be ready and willing to perform his part where there are concurrent conditions or to have performed any that are required in advance. In addition to fixing the date from which damages run it causes certain risks to pass,[9] so that the defaulting party becomes liable for loss ocuring during the period of delay unless he shows that the loss would have occurred even if he had performed in time.

The justification for the requirement of notice is making the defaulting party aware that performance is due. There is no exception where the contract specifies a time for completion and that time has passsed, for the obligation can still be performed. Article 1139 permits agreement to dispense with a *mise en demeure* in circumstances where there is a fixed time within which to complete, and importantly, without that agreement the arrival of the date is not sufficient.[10] The result, complained of but settled, is that even where the contract provides for completion by a fixed time, failure to perform does not date from that time but only from the *mise en demeure* , unless the contract is regarded as having waived the requirement.

Where a contract fixes a date for a performance which can be done only on

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7 Treitel, Remedies for Breach of Contract, p. 133.

8 Notice of default need not precede commencement of proceedings, and the receipt of process may itself constitute the notice. Caution normally dictates strict observance rather than awaiting the decision of the court on the point.

9 Article 1132.

10 This way of identifying default derives from Roman law, and although changed in the *ancien droit* to the position where the arrival of the due day took the place of the demand for performance (which remains the rule in German law, ¶¶ 284, and in the Italian Codice Civile, Article 1219). French law before the Code had reverted to the Roman rule.

that date and there is default, a *mise en demeure* is unnecessary; and equally so if the obligation is to refrain from an act when non-performance by its nature is manifest. The reason for the former is that non-performance is total non-performance by impossibility due to default. Where a *mise en demeure* is required to be given, damages for delay *dommages-intérêts moratoires* are not available in its absence, and there has been debate as to whether lack of notice also bars compensatory damages *dommages-intérêts compensatoires* .[11] This distinction is reflected in the distinction between delayed performance, to which the former are applicable, and non-performance, including defective and partial performance, to which the latter measure applies. The line between the two does not appear clearly, but reflects whether the failure to perform is irremediable or not.

In an ordinary building contract failure to complete on time would not be treated as irremediable and notice would be required. The remediability or irremediability depends on analysis of the particular agreement. For example if under a contract to fit out a stand for an exhibition the work remained unfinished when the exhibition ended then this would constitute irremediability, and seems that *jurisprudence* has moved in favour of the requirement of a *mise en demeure* in cases particularly of delay, but other circumstances may make awareness resulting from notice essential.[12]

Conversely, there is no general requirement at common law for notice of default as a precondition to a claim for damages. Performance is due without demand, even where the contract has not fixed a time for completion, when the obligation becomes one of completing within a reasonable time.[13] Where there is a resemblance is in connection with stipulations as to the time for performance which unless otherwise expressly stated are not of the essence, as for building contracts, and the point is only material to termination by way of repudiation, although it is customary for provisions for determination to contain notice terms.

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[11] Treitel, op. cit. p.135.

[12] Nicholas, The French Law of Contract.

[13] Supply of Goods and Services Act 1982, s. 14(1).

3 Liquidated Damages

The common law "penalty" and "liquidated damages" are both comprehended by the civil law *clause pénale* , for, in France, it is a contractual stipulation for payment of a fixed amount of money by the obligor in the event of his default. Much of the doctrinal debate on this subject in civil law systems arises from the fact that *clauses pénales* have a hybrid nature, being used both to guarantee the performance of a contractual obligation, and in order to provide a pre-estimate of the damage likely to flow from the particular breach in question. Some legal systems place greater emphasis on sanction as a penal clause function,[14] but in France it is the element of evaluation of damages that predominates, although both elements are at the root. This aspect is largely absent in English law due to the distinct separation of the penalty from liquidated damages.

Of interest in this area is the use that is sometimes made of similar reasoning to achieve divergent results, and that similar results are often obtained from different reasoning. The sanction aspect of penal stipulations in Roman law prevented the reduction of the sum,[15] whereas in English law and in French law prior to 1975 the aspect of prior evaluation of damages halts judicial interference with liquidated damages provisions or *clauses pénales* . The attitude in any legal system towards liquidated damages, penalties, or penal clauses reflects public policy and so varies not only between countries, but also within one country at different periods of time.

Under English law where a contract provides that should one of the parties fail to perform or to comply with a particular contractual obligation such party shall pay to the other either a specific or ascertainable sum of money, it is a question of construction whether the clause in question will be regarded as providing for the payment of liquidated damages or a penalty.[16] The

[14] Austrian, German, and Swiss law.

[15] This is reflected in Belgium where reduction is not allowed unless the contractual obligation has been fulfilled in part and the penalty is only due in part.

[16] "The distinction between penalties and liquidated damages depends on the intention of the parties to be gathered from the whole of the contract. If the intention is to secure performance of the contract by the imposition of a fine or penalty, then the sum specified is a penalty, but if on the other hand the intention is to assess the damages for breach of the contract, it is liquidated damages", Law v Redditch Local Board (1892) 1 Q.B. 127 at 132.

distinction is critical for the legal effect of each is different.[17]

The decision on the construction is to be made on the terms and inherent circumstances of each particular contract, judged at the time the contract was made and not at the time of breach or the date of decision,[18] and the classic statement of the rules laid down by the courts is that:[19]

> "(a) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest possible loss that could conceivably be proved to have followed from the breach.
> (b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid ...
> (c) There is a presumption (but no more) that it is a penalty when a single lump sum is made payable by way of compensation on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage.
> (d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties."

"Unconscionable ... is merely a synonym for something which is extravagant and exorbitant",[20] and it is referable to the contract and the obligation to which it relates, not to inequality of bargaining power that might have resulted in the term. The agreed sum may not be a true pre-estimate of damages and the question arises as to whether the liquidated damages are the limit of recovery. The provision may constitute a limitation on very heavy damages that are foreseen to result from a potential breach, and this will be upheld.[21] In *Temloc Ltd.v Ermill Properties Ltd.* [22] the parties' provision that

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[17] The fact that the parties have used the expression "penalty" or that of "liquidated damages" is by no means conclusive, for the court still has to ascertain whether or not the parties have genuinely attempted to assess the damages; Clydebank Engineering and Shipbuilding Co. v Don Jose Ramos Yzquierdo y Castaneda (1905) A.C. 6 at 9.

[18] Dunlop Pneumatic Tyre Co., Ltd. v New Garage and Motor Co. Ltd. (1915) A.C. 79 (H.L.); Lord Dunedin at 86, citing Public Works Commissioner v Hills (1906) A.C. 368 (P.C.).

[19] (1915) A.C. 79, at p. 87f.

[20] Lord Wright M.R. in Imperial Tobacco Co. Ltd. v Parsley (1936) 2 All E.R. 515 at 521.

[21] Cellulose Acetate Silk Co. Ltd. v Widnes Foundry (1925) Ltd. (1933) A.C. 20, where it was expressly left open whether if construed as a penalty it would give rise to a limitation on damages.

[22] (1987) 39 B.L.R. 30 (C.A.). The insertionof the "£ nil" was made in the Appendix to the JCT standard form for the amount of liquidated damages .

the liquidated damages for delay should be "£ nil" was regarded as an agreement for no damages for late completion, and exhaustive of what was or was not to be paid so excluding a claim for general damages for delay.

This reflects the attitude of English law towards liquidated damages that it will neither increase nor decrease the amount agreed upon provided the contract in which it is inserted is valid, and that the circumstances giving rise to payment have in fact arisen, for such an alteration would be an unwarranted interference with freedom of contract.[23]

Lack of flexibility may impose its own dificulties in conjunction with the distinction between a penalty and liquidated damages, for when the amount stipulated is construed as providing for liquidated damages it is payable in full whether the damage suffered be greater or lesser, or even non-existent.[24] The inability of the law to reduce liquidated damages or to adjust for partial performance can itself lead to the provision being construed as a penalty, particularly in building contracts where a single sum is stipulated but the works are required to be completed in sections or equally where the employer takes possession of part of the works. Where there is no effective provision by the parties for dividing the sum between sections or between parts taken into posession, then upon failure to complete a section in time or to hand over possession of the whole of the works neither the whole sum can be claimed as liquidated damages nor can a claim for a part of the sum be maintained. In both instances the sum represents a penalty.[25]

Where construed as providing for the payment of a penalty the effect is that, since a penalty is as such a security for the contractual performance, the promisee is adequately compensated if he recovers his actual loss, and he is regarded as acting unconscionably if he attempts to recover a sum of money which, although fixed by the contract, is disproportionate to the amount of damage suffered.[26] Where the damage suffered is less than the amount of the

[23] On the principle of freedom of contract in English law see the judgment of Jessel M.R. in Printing and Numerical Registering Co. v Sampson (1875) L.R. 19 Eq. 462, at p. 465.

[24] Wallis v Smith (1882) 21 Ch.D. 243.

[25] Bramall & Ogden Ltd. v Sheffield City Council (1983) 29 B.L.R. 73; Stanor Electric Ltd. v R. Mansell Ltd. (1988) C.I.L.L. 399.

[26] Watts, Watts & Co., Ltd. v Mitsui & Co., Ltd. (1917) A.C. 227 (H.L.).

penalty recovery is limited to the actual amount of damage suffered.[27] Where the actual damage is more than the amount of the penalty the authorities are less than clear; a claimant may be able to disregard the penalty and sue for the actual damage,[28] unless the clause is construed as a limitation of liability.[29] If a penalty is not to be imposed as by nature not a genuine pre-estimate of loss then to ignore it to allow a claim for an even greater sum would be an extraordinary result. It is unlikely that both the elements of a specified sum not being a genuine pre-estimate and greater actual loss will be present, but a just result may be found by not denying the defaulting party the benefit of the limitation because of deficiencies in the other's pre estimate. This would be consistent with liquidated damages that are less than a genuine pre-estimate operating as a limitation on the consequences of the default.[30]

One of the characteristics of a clause construed as providing for liquidated damages is that it removes the burden on a claimant to prove damage. The position is otherwise where construed as a penalty,[31] and the distinction avoids the theoretical discussions in continental legal literature on the nature of penal clauses. A perceptible tendency is to uphold clauses as liquidated damages rather than strike them down as penalties,[32] even though they may constitute not only an attempt to assess loss from a breach but an endeavour to insure against a breach of contract itself. In this approach the former dislike of penal clauses has given way to reluctance to interfere with

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[27] Wilbeam v Ashton (1807) 1 Camp. 78.

[28] Wall v Rederiaktiebolaget Luggude (1915) 3 K.B. 66; Watts, Watts & Co., Ltd. v Mitsui & Co., Ltd. (1917) A.C. 227 (H.L.); and dicta of Lord Mansfield in Lowe v Peers (1768) 4 Burr. 225, at 228. The above question was not regarded as decided by the House of Lords in Cellulose Acetate Silk Co., Ltd. v Widness Foundry (1925) Ltd. (1933) A.C. 20.

[29] Watts, Watts & Co., Ltd. v Mitsui & Co., Ltd. (1917) A.C. 227 (H.L.).

[30] As in Temloc Ltd. v Errill Properties Ltd. (1987) 39 B.L.R. 30 (C.A.).

[31] R v London Guarantee and Accident Co., Ltd. (1920) 2 W.W.R. 85, at p. 88.

[32] Atiyah, The Rise and Fall of Freedom of Contract. Robophone Facilities Ltd. v Blank (1966) 1 W.L.R. 1428, the "court should not be astute to descry a 'penalty clause'", Diplock L.J. at 1447. For "The fact that in certain circumstances a party to a contract might derive a benefit in excess of his loss does not ... outweigh the very genuine estimate, formed at the time the contract was made of the probable loss", Law Commission Working Paper No. 61, Penalty Clauses and Forfeiture of Monies Paid.

the freedom of contract,[33] unless to relieve oppression.[34]

An important and recent review of the established law was produced in *Phillips v A. G. of Hong Kong* ,[35] and the tendency to uphold liquidated damages provisions moved to an unwillingness to entertain contrary argument on hypotheses, where thought has been given to the calculation and in the commercial context of both parties having agreed the sum. Phillips' attack on the liquidated damages provision was based on hypothetical situations under which the sum payable would be out of proportion to any loss that might be suffered. This was regarded as unsatisfactory for "Arguments of this nature should not be allowed to divert attention from the correct test as to what is a penalty provision - namely is it a genuine pre-estimate of what loss is likely to be? - to the different question, namely are there possible circumstances where a lesser loss would be suffered?"[36] The historical approach to penalties of equitable relief and the guidance in the *Dunlop* case was referred to, but the established premise of a determination objectively made at the time of making the contract "does not mean what actually happens is irrelevant"[37] in relation to the reasonable

[33] This reluctance was expressed as " ... paramount public policy ... that you are not lightly to interfere with this freedom of contract", per Jessel M.R. in Printing and Numerical Registering Co. v Sampson (1875) L.R. 19 Eq. 462, at p. 465. Such affirmation is comparable with the terms Article 1134 of the Code Civil: "Les conventions légalement formés tiennent lieu de loi à ceux qui les ont faites." [Agreements legally entered into have the force of law for those who make them.]

[34] "It is now evident that the power to strike down a penalty clause is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression." per Dickson J. in Elsey v J.G.Collins Insurance Agencies Ltd. (1978) 83 D.L.R. at p. 15, Supreme Court of Canada, as cited with approval in the Australian High Court in Esanda Finance Corporation Ltd. v Plessnig (1989) A.L.J. 238.

[35] Phillips Hong Kong Ltd. v A. G. of Hong Kong (1993) 61 B.L.R. 41 (H.L.). Phillips contracted with the Hong Kong Government to design, supply, install and commission acomputerised supervisory system for roads and tunnels to be built under separate contracts under which the programmes and flow charts identified Key Dates that had to be met to allow other contractors to continue work unimpeded. The contract provided for liquidated damages if those Key Dates were not met, the sums varying according to the section of work to which they related, and additionally for liquidated damages at a daily rate if the whole work was not completed within the specified time. A provision for the reduction of the liquidated damages by virtue of prior occupation or use, which had founded the successful argument as to the penal nature at first instance, was held not applicable because of the nature of Phillips' work. Phillips did not allege that the sum sought to be recovered was excessive in comparison with the actual loss suffered.

[36] At page 63. The analysis of the approach was that "Except possibly in the case of situations where one of the parties to the contarct is able to dominate the other a to the choice of the terms of a contract, it will normally be insufficient to establish that a provision is objectionably penal to identify situations where the application of the provision could result in a larger sum being recovered by the injured party than his actual loss. Even in such situations so long as the sum payable in the event of non-compliance with the contract is not extravagant, having regard ti the range of losses hat it could reasonably be anticipated it would have to cover at the time the contarct was made, it can still be a g nuine pre-estimate of the loss that would be suffered and so a perfectly valid liquidated damages provision."

[37] "On the contrary it can provide valuable evidence as to what could reasonably be expected to be the loss at the time the contract was made", at page 59.

expectation of loss.

4 English and French law antecedents

The origin of the English distinction between penalties and liquidated damages appears as an historical incident arising from the conflicts of jurisdiction between the courts of common law and equity.[38] Common law made no distinction between penalties and liquidated damages and enforced what would be regarded as penalties. Equity intervened to grant relief where appropriate. It appears that during the fifteenth century[39] the courts of equity granted relief in the case of common money bonds[40] where fraud was involved, where default in payment was justified, and whenever payment with interest was tendered. This was subsequently extended to cover cases where bonds were given not only to secure payment of a specific sum of money on a given date, but to secure or prevent the performance of some act. The principle applied,[41] was to reduce penalties which were regarded as oppressive and unconscionable,[42] on the basis that it was contrary to natural justice to have contract provisions that were *in terrorem.*

In the seventeenth century the lack of distinction at common law between penalties and liquidated damages changed, for those courts acquired jurisdiction over penalties by means of the Administration of Justice Acts, 1696, and 1705.[43] The latter Act provided that the debtor on a bond could plead a defence that he had by the time of the action paid the debt and interest; and that he could pay the principal, interest and costs into court and obtain a discharge by judgment.

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38 There is disagreement as to how the jurisdiction in respect of penalties evolved; Law Commission Working Paper No. 61, Penalty Clauses and Forfeiture of Monies Paid.

39 C, Marsh, Penal Clauses in Contracts, Journal of Comparative Legislation, 3rd series, 66 at 69.

40 A bond entered into in order to secure the payment of a given sum of money with interest, coupled with an undertaking to pay a greater specified sum of money if payment is not made on the agreed date.

41 Probably from the latter part of the eighteenth century; for as late as the middle of the eighteenth century there are reported cases in which the courts of equity refused to examine the amount stipulated in the parties' contract and in which they refused to intervene although the clauses in question would undoubtedly be regarded as *in terrorem* today; Roy v Duke of Beaufort (1741) 2 Atk. 190.

42 Sloman v Walter (1783) 1 Bro. C.C. 418.

43 8 & 9 Will. 3, c.11; and 4 & 5 Anne, c. 16, s.2.

The result of these statutes was that at common law,[44] whenever the claimant sued to recover a fixed or ascertainable sum of money as being payable by the respondent on breach of contract, the court had to determine whether or not such sum of money was a penal sum within the meaning of the statute. Where the sum of money was regarded as penal, the entitlement was to the actual loss suffered which had to be proved. Where the sum was not regarded as penal the courts were bound to award the amount agreed upon in full, neither more nor less,[45] and without proof of damage.

The hybrid nature of *clauses pénales* in civil law as both a guarantee of performance of a contractual obligation and a pre-estimate of damage on the breach of it, is a direct consequence of the function of these clauses varying historically. The origin of the uncertainty that civil law had towards these provisions is found in Roman and canon law where the repressive nature of penal clauses gave way to the hybrid nature.[46]

Under early Roman law, the *stipulatio poenae* was a single conditional obligation,[47] used as a sanction to promises that were not legally enforceable,[48] and the penalty was payable in full notwithstanding partial performance, or even where the subject matter had been destroyed by circumstances beyond the debtor's control.[49] This early form surrendered to a second formula of a principal obligation followed by a penal stipulation for non-performance which was both repressive and a means of assessing damages for non-performance,[50] which resulted in the creditor having to choose between

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[44] Notwithstanding that the jurisdiction of the courts of equity over penalties lingered on until the Supreme Court of Judicature Acts, 1873-1875.

[45] On the manner in which the courts of common law came to adopt the doctrines of equity, see the judgment of Bramwell B. in Betts v Burch (1859) 4 H. & N. 506.

[46] Maruani, La clause pénale, p.17.

[47] The formula used being *si Pamphilum non dederis, centum dare spondes?* If you do not transfer to me the property in Pamphilus, do you promise to pay me a hundred -?

[48] Such as where A promised B that he would give money to X in order that X should perform some act. This sanction formed part of the system of private penalties common to all systems of early law.; Savigny, Droit des obligations, 1863, French edition, II, p.421.

[49] Fliniaux, L'evolution du concept de clause pénale chez les canonistes du Moyen Age, Melanges Fournier, 1929, p. 234-235. More striking was that where the penalty was insufficient to cover the damage suffered, the penal stipulation did not prevent the creditor recovering both the amount of the penalty and damages, and even though the amount of the penalty exceeded the actual damage it was fully recoverable.

[50] Buckland, A Textbook of Roman Law, p. 428-429 in 3rd. ed. *Pamphilum dari spondes? Si non dederis centim dare spondes?* Do you promise to transfer to me the property in Pamphilus? If you do not transfer the property to me, do you promise to pay me a hundred?

recovery of a penalty and recovery of damages.[51]

Penal stipulations were developed as a means of avoiding proof of damage,[52] but subsequently they became regarded solely as a means of securing the performance of an obligation, and not as assessing the damages prospectively arising on default, although this use reappeared with the development of canon law in the middle ages.[53] The medieval canonists attempted to establish a distinction between penal clauses that were *bona fide* and those that were not, but there were difficulties in applying such a subjective distinction. An advance appeared in the application of the doctrine of *interesse*, which, borrowed from the civil law, permitted a distinction to be drawn between usury, regarded as so much per cent, and *interesse* , or damages. The distinction led to debate as to whether a penalty could exceed the amount of damage, and the proposal of a further distinction between cases where the penalty was an assessment of damages, when it must not exceed the damages, and cases where the penalty was a punishment of the debtor, in which case it could not be reduced.[54]

On the question of whether or not a judge should be allowed to reduce the amount of the penalty where it was in excess of the damage, opinions remained divided, even into the drafting of the Code Civil, and beyond. The reduction was favoured on the ground that as the whole object of the penal

[51] The principal obligation was regarded as extinguished once the penalty was sought, and there was a mechanism to prevent a creditor seeking to recover both damages and the penalty.This was the *exceptio doli* . Mauler, De la nature de la clause pénale, 1898, p.28. There is a text in the Digest that allowed the creditor to sue for damages after payment of the penalty, where the amount of the penalty was less than the actual damage. However, there was no suggestion of the amount of the penalty being reduced where it was greater than the amount of damage suffered, and it was not until the development of canon law in the thirteenth century that this question first began to be disussed - D. 19.1.28.

[52] Justinian stressed the central point that a penal stipulation avoids the necessity for a creditor having to prove damage arising from a breach of contract and that it also avoids the judge having to assess the evidence regarding such damage, Institutes, III, 15, 7.

[53] Penal clauses may serve several functions, and under Roman law an ancillary benefit was make actionable certain obligations that were not as a matter of strict law enforceable. In canon law it would seem that penal clauses first came to be used because they offered a means of avoiding the usury laws which were stifling economic development; so that, instead of concluding a contract whereby A lent B 100 with a proviso that B would pay A five per cent interest if he did not repay A by a certain date, which would have infringed the usury laws, A would lend B 100 and B agreed to pay the penalty of 105 if he did not repay A on the agreed date; and on the agreed date A could sue B directly for the penalty. Glasson, Histoire du droit francais et des institutions de la France, Paris, 1887-1903, III, p. 235. At first applied solely to the clergy, the usury laws were applied to everyone in A.D. 789 by Charlemagne.

[54] Provided it was not used in fraud of the usury laws. P. Benjamin, Penalties, Liquidated Damages and Penal Clauses in Commercial Contreacts: A Comparative Study of English and Continental Law. (1960) 9 I.C.L.Q. 600.

clause was to provide a pre-estimate of damages a judge should be allowed to reduce the amount where it was more than the damage, and opposed on the ground that the sole object of a penal clause was not so much to assess the damages as to avoid difficulties of the burden of proof. The importance of the former was that this doctrine passed out of the realm of canon law into the civil law, and until the Code Civil, the *droit commun* had adopted the idea of the reduction of an excessive penalty by a court of law on the ground that the object of a penal clause was solely to assess the damages. [55]

5 *La Clause Pénale*

In France the *clause pénale* is in principle valid, unlike the description in English law produced by literal translation. Its straightforward definition in Article 1226 is broad enough to include things other than the payment of money: "A *clause pénale* is one whereby a person, in order to assure the performance of an agreement, binds himself to something in the event of default."[56]

It is a provision made at the time of making the contract, for Article 1152, limiting recovery to the stipulated sum, refers to an agreement providing for payment of a certain sum if he shall fail, *manquera* , to perform his part of the of the contract; and it has been described as a form of *astreinte* .[57] The sensible object of fixing damages in advance which gives certainty and a known limitation is coupled with the degree of coercion that results from the consequences of failure in the obligation to which the clause relates. This latter aspect may attract complaint when legitimate anticipation becomes economic abuse.

The *clause pénale* is attached to the principal obligation so that nullity of the latter has the same effect on the *clause pénale* , but the converse does not

[55] Pothier underlined the nature of a penal clause in terms: *"La peine est compensatrice des dommages et intérêts que le créancier souffre de l'inexécution de l'obligation principale."* Traite des obligations, Paris-Orleans, 1763, I, No. 342, p. 417. [The penalty is compensation in damages which the creditor suffers from inexecution of the principal obligation.]

[56] Article 1226: *"La clause pénale est celle par laquele une personne, pour assurer l'exécution d'une convention, s'engage à quelque chose en cas d'inéxecution."*

[57] Carbonnier, Droit Civil.

apply.[58] Whatever the ingredients for default under the principal obligation they must exist before the *clause pénale* can be invoked, so that the time at which a penalty becomes due depends on the time at which the performance under the principal agreement is properly due. This is not limited to the fulfilment of the express provisions of the agreement but includes any applicable rules of law. If a *mise en demeure* is required for the purpose of putting the obligor in default then it must equally be given to sustain a claim under the *clause pénale* . This derives from Article 1230:

> "Whether the original agreement does or does not contain a provision requiring compliance, the penalty is only incurred when he who is under the obligation to deliver or take up or do is in default."[59]

It is possible though for the *clause pénal* itself to stipulate a dispensation from the requirement of a *mise en demeure* ,[60] but this may be achieved even by implication where for example the provision is that the penalty shall become due by the mere expiry of the time fixed.

The *clause pénale* is not an alternative to performance of the principal obligation, and payment under it does not discharge the obligation. Conversely, how far is the obligee bound? Article 1228 gives a apparent choice:

> "The creditor, instead of requiring the penalty stipulated from the debtor who is in default, may proceed for execution of the principal obligation."[61]

However, the perception of non-performance of the obligation, *l'exécution de l'obligation* , is not limited to the continued physical performance, but rather as inclusive of the wider obligation to pay damages for inexecution of which the penalty is but an evaluation. Accordingly, Article 1228 is not presenting an option between performance or penalty, but emphasises the fact that the existence of a *clause pénale* does not exclude pursuit of

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[58] Article 1227, *" La nullité de l'obligation principale entraîne celle de la clause pénale. La nullité de celle-ci n'entraîne point celle de l'obligation principale."* [Nullity of the principal obligation involves that of the clause pénale. Nullity of the latter does not involve that of the principal agreement.]

[59] Article 1230:*"Soit que l'obligation primitive contienne, soit qu'elle ne contienne pas un terme dans lequel elle doive être accomplie, la peine n'est encourue que lorsque celui qui s'est oblige soit à livre, soit à prendre, soit à faire, est en demeure."*

[60] Mazeaud and Tunc, Traité de droit civil.

[61] Article 1228: *"Le créancier, au lieu de demander la peine stipulée contre le débiteur qui est en demeure, peut poursuivre l'exécution de l'obligation principale."*

performance.[62]

The substance of this is found in Article 1229:[63]

> "The *clause pénale* is the compensation in damages which the creditor suffers from inexecution of the principal obligation.
> He may not claim at the same time both the principal obligation and the penalty, unless it was stipulated for simple delay."

The exception of simple delay is of importance for building contracts, but if the obligation to which the *clause pénale* attaches includes other obligations then the question arises as to an employer's ability to recover more than the penalty. Prior to the Code Civil, on the prevailing opinion that such clauses were a means of assessing damage, they were subject to judicial interference where the penalty exceeded the damage, but the final terms of the Code accepted the proposition of assessment, but rejected intervention. Whether the object be genuinely to assess damages, or to compel an economically weaker party to perform an obligation, the same consequences follow, for in practice *clauses pénales* are predominantly applied as providing for what common law terms liquidated damages. Articles 1229 and 1152 laid down the premise adopted by French law, with Article 1229 in its first section reproducing practically word for word Pothier's statement of the nature of a penalty.[64]

If the penalty is solely an assessment of damages payable on default then no more than the penalty could be recovered on a claim for monetary compensation. This was the effect of Article 1152 which remained unaltered from the inception of the Code until 1975:

> "When an agreement provides that one who shall fail to execute it shall pay a certain sum by way of damages, there shall be no award made of a greater or a lesser sum to the other party."[65]

The Article contained the rejection of the doctrine of the *droit commun* as to

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[62] Planiol and Ripert, Traité pratique de droit civil français. German law apparently gives the choice in that §§340 par. 1 provides that the creditor can sue for the penalty instead of performance.

[63] Article 1229: *"La clause pénale est la compensation des dommages et intérêts que le créancier souffre de l'inexécution de l'obligation principal. Il ne peut demander en même temps le principal et la peine, à moins qu'elle n'ait été stipulée pour le simple retard."*

[64] Set out at note 55 above.

[65] Article 1152: *"Lorsque le convention porte que celui que manquera de l'exécuter payera une certaine somme à titre de dommages-intérêts, il ne peut être alloué à l'autre partie une somme plus forte, ni moindre."*

judicial intervention,[66] for although the position represented by Articles 1229 and 1152 was that penal clauses are solely a means of assessing damages, it was considered an unwarranted intervention with the parties' contract for a court to modify in any way the damages agreed.

Where substitute performance is secured through an authorisation under Article 1144 such a claim would result in a money judgment, but not for damages in addition, and it was unclear whether Article 1152 would apply to such a claim.[67] In view of the *Loi* of 9th July 1991 enabling the court to order payment in advance of the sum necessary to secure the substitute performance the point becomes increasingly significant. The result will, it is suspected, reflect the particular obligation for which the substitute performance is authorised as against that secured by the *clause pénale*, with difficulty arising where it is the whole obligation.

The important aspect in relation to building contracts is the express exception in Article 1229 from the prohibition on claiming compensation in addition to enforcing the *clause pénale* where the latter relates to simple delay. This will obviate difficulty in the ordinary case. It is on its face, however, a narrow exception to stipulate, both when contrasted with other Codes,[68] and the common law under which a clause liquidating damages for one breach will not affect the damages recoverable on another breach.[69] It would be applicable as an exception where there was one obligation to do and another to do it within a certain time, to which latter a *clause pénale* was attached, but where a penalty is stipulated for a particular breach of one obligation in an agreement other than time it does seem that damages for breach of another may be recovered.[70]

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[66] When the Civil Code was drafted there were partisans of the hybrid nature of penal clauses, and the legislative section of the Tribunate in an unadopted portion went so far as to distinguish between cases where the penal clause provided for the payment of liquidated damages and no judicial intervention was desirable, and cases where the penal clause provided for the payment of a penalty, which should be subject to judicial control.

[67] Treitel, op. cit.

[68] The Swiss and Austrian Codes follow the general rule disallowing a claim for both the principal obligation and the penalty, but the exception extends to where the penalty is for failure to perform either at the agreed time or at the agreed place; Swiss CO Art. 160 par. 2, Austrian CC ¶¶ 1336 par.1 sent.3. The German CC ¶¶ 341 par.1 extends the exception to where the penalty was provided for failure to perform properly, in accordance with the contract, of which failure to perform to time is give as an illustration.

[69] An example is Akt. Reidar v Arcos (1927) 1 K.B. 532.

[70] Clause pénale. Généralités, J. Cl. Civ. art.1226 - 1233 no. 119.

That different results sometimes obtain from similar reasoning was true of *clauses pénales* under French law. Having identified the result by Article 1229 as compensation in respect of damage suffered from non-performance, it would have been logical to conclude that where the damage was less than the penalty the amount stipulated should be reduced.[71] Instead French law invoked sanctity of contract to prevent interference, much as English law relies upon the freedom of contract to prevent interference by a court with liquidated damages. The reason behind the attitude of French law would not appear to have been based upon analysis of the nature of such clauses, but on the premise that it was not in the interest of public policy to interfere with a bargain freely entered into solely on the ground of the inadequate appreciation by the parties of the amount of damage likely to follow from a breach of contract.[72] This public policy was irrespective of whether the *clause pénale* was designed to assess damages, secure performance of a contractual obligation, or prevent its breach, whether the parties were equal in economic power,[73] or, whether or not the damage be greater than the sum stipulated.

The French principle of literal enforcement left no power to reduce the stipulated sum on the ground that it was excessive, and unlike the common law, it may not be invalidated as extravagant and representing a "penalty" so understood. Notwithstanding doctrinal criticism, the French courts remained faithful to the rule in Article 1152 in their refusal to alter amounts stipulated in *clauses pénales* and consistently disregarded arguments founded on natural justice and *équité*. To so interfere would contravene the freedom to agree as parties might, and to effect a reduction in the amount would destroy the beneficial and wholly justifiable end of obviating problems of assessment of damages.

This position was reversed in 1975. The alteration gives effect to the *droit*

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[71] Being the solution favoured by classical Roman law, canon law, and in fact by Pothier.

[72] This policy element at the time of drafting the Code reflected distrust of judicial power; note 67 below.

[73] This was deplored by Carbonnier, Droit Civil, in the 1959 edition, II, p. 543, who drew attention to the fact that where the parties are not on the same footing of equality, recourse must be had to legal theories of a general nature such as abuse of rights, or *"fraude à la loi"*, if it is desired to protect the weaker party.

commun and its origins, and to the disappearance of the caution with which judicial intervention was regarded at the time of drafting the Code.[74] A second paragraph to Article 1152 was introduced in two stages so that a judge may "reduce or increase the penalty agreed if it is manifestly excessive or ridiculously low", and any stipulation to the contrary is void.[75] The manifestly excessive or derisory nature of the penalty is determined at the time of the judge's decision.[76] Whilst the award is not required to be regulated on the basis of the actual damage suffered it has the effect of setting limits, for the reduction cannot be to less, nor an increase to more, than the actual damage.

French law also permits a reduction in the stipulated penalty where the contract had been performed in part, and the previously existing ability for the parties to exclude this power of the court by contrary agreement has been curtailed. This is achieved by Article 1231:

> "When the agreement has been performed in part, the agreed penalty may equally be reduced by the judge in proportion to the benefit which the partial execution has given to the creditor, without prejudice to the application of Article 1152. Any provision to the contrary shall have no effect."[77]

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[74] The question whether or not a court of law should be empowered to modify a penal clause was the subject of a heated discussion at the time, summed up by Bigot-Préameneu before the Conseil d'Etat in the following terms: "On disait, d'un côté, que les contrats devant être exécutés de bonne foi, it était juste de réduire la somme à laquelle les parties avaient fixé les dommages-intérêts; due le débiteur n'a consenti à en élever la fixation beaucoup au delà de la juste proportion due parce qu'il s'est persuadé qu'il pourrait remplir ses engagements, et qu'il ne serait pas exposé à la peine de l'inexécution; que s'il eût prevu les obstacles qui l'ont arrêté, il ne se serait pas soumis à des dommages-intérêts si considérables, qu'enfin les principes étaient ceux de la jurisprudence actuelle.
"On disait, d'un autre côté, que les parties sont les appréciateurs les plus sûrs du dommage qui peut résulter de l'inexécution d'un engagement; qu'ainsi leur volonté doit être respectée; que si l'on accorde au juge le droit de dimineur les dommages-intérêts qu'elles ont fixés, il faut donc aussi leur donner le pouvoir de les augmenter lorsque les circonstances portent la perte du créancier au delà de ce qui avait été prévu ...
"Au milieu de ces difficultés, la section s'est arreêtée à une règle simple; elle a pensé que quand les parties ont fixé elles-memes le taux des dommages-intérêts, leur prévoyance ne devait pas demeurer sans effet, et qu'il fallait respecter leurs conventions, d'autant plus que, dans d'autres contrats, on ne corrige pas les stipulations que les circonstances rendent ensuite excessives ..."
Fenet, Recueil complet des Traveaux préparatoire du code civil, Paris, 1827-28, XIII, Procés verbal de la seance du 11 brumaire.

[75] Article 1152 as altered: "(*Loi no. 85-1097 du 11 oct. 1985*) < Néanmoins, le juge peut, même d'office, modérer ou augmenter la peine > (*Loi no. 75-597 du 9 juillet 1975*) < qui avait été convenue, si elle est manifestement excessive ou dérisoire. Toute stipulation contraire sera réputée non écrire. >"

[76] Cass. civ. 19th March 1980, Bull 1 n. 95, p. 76.

[77] Article 1231 as altered: " *(Loi no. 75 - 597 du 9 juillet, 1975)* Lorsque l'engagement a été exécuté en partie, la peine convenue peut *(Loi no. 85 - 1097 du 11 octobre 1985)* ≤, même d'office ≥ être diminuée par le juge à proportion de l'intérêt que l'exécution partielle a procuré au créancier, sans préjudice de l'application de l'article 1152. Toute stipulation contraire sera reputée non écrite."

Notwithstanding the expressed inability to exclude the power of reduction for part performance there has been a decision that a judge may not apply this Article where parties have themselves provided for a reduction in the penalty in proportion to the benefit that part performance of the agreement will give to the creditor.[78]

The underlying structure of the original Article 1231 was a presumed intent of the parties that their contractual assessment of damages be altered where in fact the actual damage is reduced due to part performance, but this was a dubious argument when the courts would not reduce the contracted assessment where, independently of the doctrine of part performance, the actual damage was less than the sum stipulated. Article 1231 had been of limited application, for the courts refused to apply its provisions where the object of the penalty was to prevent delay in performance as opposed to performance itself, but in conjunction with the sea change in Article 1152 flexibility has been achieved, albeit at the expense of certainty.

An exception to the rule in Article 1152, deriving from judicial application, remains extant.[79] The French courts disregarded the sum stipulated in a penal clause where the actual damage was greater in circumstances of *dol* or *faute lourde*, gross negligence or deliberate fault, on the ground that it is contrary to public policy to allow a debtor so to benefit.[80] The effect is that the party in such default must compensate for the entirety of the damage.

Clauses pénales are enforceable where damages can be awarded by a court so that, unless the contract of which the provision forms part is void[81] or the contract has been performed,[82] it is for the plaintiff suing on a *clause pénale* to prove the existence of the contract containing the clause, that it has been

[78] Com. 21 July 1980, D.1981.335, note Chabas; J.C.P. 1982. II 19778, note Boccara; Gaz. Pal. 1981.I. 207, note Bey.

[79] There is another exception to the rule in Article 1152 in that the courts will inquire into the adequacy of a sum stipulated in a penal clause where the law excludes the contractual avoidance of liability, for the insertion of a very low figure as penalty would provide a means for drafting a clause of non-responsibility in the form of a penal clause.

[80] Article 1150 is invoked which provides: "Le debiteur n'est tenu due des dommages et interets qui ont ete prevus ou qu'on a pu prevoir lors du contrat, lorsque ce n'est point par son dol que l'obligation n'est point executee." [The debiteur is liable only for the damages which were foreseen or were foreseeable at the time of the contract, provided that it is not by his *dol* that the obligation is not performed]

[81] Article 1226.

[82] Article 1229 al. 2 and Article 1231.

freely accepted, and that it has actually come into operation by reason of the circumstances in which it is to apply.[83]

The assimilation of *clauses pénales* and damages is not carried to its ultimate conclusion, for as recorded anew the object of *clause pénales* is not only to provide redress for breaches of contract, but also to induce performance of agreements so that the extent of the penalty will not necessarily equate to the actual damage suffered on breach.[84]

6 Commencement, Completion and Extensions of Time

The practical application of a provision for liquidated damages or a *clause pénale* will depend upon the ascertainment of the performance required as to time in the relevant circumstances.

JCT 1980 provides that "On the Date of Possession, possession of the site shall be given to the Contractor who shall therefore begin the Work, regularly and diligently proceed with the same on or before the Completion Date."[85] The " Works" are represented by physical work notwithstanding the multitude of other attendant obligations that may be provided for in the Contract Bills.[86] The definition of "the Completion Date" is not simply "the Date for Completion", as agreed prior to contract and stated in the Appendix, but continues "or any date fixed under either Clause 25 or 33.1.3" so as to include the effects of extensions of time.

Under AFNOR 1991 a characteristic of the CCAG, which apply unless modifed, is the provision of a period of preparation.[87] During this period the contractor is required to draw up and transmit to the *maître d'oeuvre* certain of the documents that constitute contract particulars.[88] These comprise

[83] Subject to proof as to formal notice to the debtor to comply with the obligation secured by the penal clause, Article 1230.

[84] Com. 29th January 1991, Bull. civ. IV, no. 43.

[85] JCT 1980, clause 23.1.1. The Appendix to the Conditions should contain the parties' agreement of the date of possession which will ordinarily be a fixed date for possession of the whole site.

[86] They are defined as: "the Works briefly described in the first recital and shown and described in the Contract Drawings and in the Contract Bills".

[87] Afnor: Article 1.3.2.2.3.

[88] Afnor: Articles 2.4 and 4.1 and 4.2.

particular details for the carrying out of the work, a chart showing the organisation of the contractor's business, the programme for carrying out the work, specific survey and investigation plans, and any other documents that are required to be prepared by the contractor by the contract.[89] This programme must fall within the overall timetable of the works notwithstanding that it may bring about changes within it.[90] The period of execution follows on immediately after the period of preparation but the parties are able to provide in their contract particulars for the commencement of the period of execution before the period of preparation had ended.

The actual date for commencement of the work itself is fixed by instruction from the *maître d'oeuvre*, countersigned by the employer. The date may not be before the issue of the construction permit or other required authorisation.[91] The instruction to commence has to be delivered between the 30th and 15th day before the date fixed as the commencement of the period of execution.[92]

The time for the work falls to be considered by reference to the 2 periods of preparation and execution.[93] The period of preparation is that time necessary for the drawing up of those documents in article 4.1 being the contractor's responsibility.[94] It starts the day following the day upon which notification is given to the contractor that the contract has been concluded and extends for three months unless agreed otherwise by the parties in the CCAG.[95] The period of execution may itself be divided into a period for the organisation of the work and a period for the carrying out of the actual work itself.[96] Intermediate periods may be fixed for the execution of identified work.[97]

The date of completion of the works is the date upon which they are in fact

[89] Afnor: Articles 4.1.1, 4.1.2, 4.1.3, 4.1.4, and 4.1.5.
[90] Afnor: Article 4.1.3.
[91] Afnor: Article 7.3.1.
[92] Afnor: Article 7.3.2.
[93] Afnor: Article 7.
[94] Afnor: Article 7.1.1.
[95] Afnor: Article 7.1.2.
[96] Afnor: Article 7.2.1.
[97] Afnor: Article 7.2.2.

actually completed.[98] The obligation to complete is to be found in the date agreed as the date for completion, and in the obligation to pay penalties for delay requiring consideration of the provisions for extending time.

The scheme for extensions of time[99] under JCT 1980 requires notice by the contractor of the material circumstances when it becomes reasonably apparent that the progress of the Works is being or is likely to be delayed. The cause of delay and the any event "Relevant Event", being matters that entitle the contractor to an extension of time, must be identified.[100] The ability to guage progress is less easy without the facility of a programme and the absence of a clause requiring one is a notable distinction from AFNOR. In practice, provision may be made for a programme in general clauses in Bills of Quantities.[101] Particulars are required to be given by the contractor of the expected effects of relevant events, either in the notices or as soon as possible.

The architect has then first to form an opinion whether the causes of delay are "Relevant Events", and whether by reason of them completion is likely to be delayed, and if so, then he has to extend time by fixing such new Completion Date as he estimates to be fair and reasonable.[102] Such date may be made earlier to account for omissions.[103] This scheme is drafted so as to operate during the work and before the Completion Date; but after it, and within 12 weeks of the date of practical completion, the Completion Date must be fixed by the Architect, whether later, earlier or the same as that fixed during the Work.[104]

The catalogue of events in JCT 1980 clause 25.4 which have the potential effect of relieving the Contractor from his obligation to complete by the Completion Date and which would result in a later date is such as to render frustration of the contract by an unforeseen supervening event highly

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[98] Afnor: Article 7.4

[99] JCT: Clause 25.

[100] JCT: Clause 25.2.

[101] Reliance on such a provision as a ground for alleging breach in failing to adhere to a programme is unlikely to be course in the face of the obligation only to complete by the Completion date.

[102] JCT: Clause 25.3.

[103] JCT: Clause 25.3.2.

[104] JCT: Clause 25.3.3.

unlikely. The list commences with force majeure, and exceptionally adverse weather conditions, and includes instructions issued by the architect. The nature of those instructions that may give rise to extensions of time include: those arising on finding any discrepancy or divergence between documents or parts of documents, including drawings, bills and instructions; instructions requiring a variation; those requiring postponement of any work; and instructions in connection with nominated sub-contractors or suppliers. The list continues at length.[105]

Under AFNOR 1991 article 7.5 governs extensions of the period of execution and is divided into categories. The first is extensions for reasons not attributable to the parties. The time is extended in respect of the duration of inclement weather,[106] which are those days when work is halted.[107] Further there are also to be taken into account those days during which it is not practically possible to continue work.

Other reasons for the duration of which the time is extended are the impediments of force majeure; public holidays and special fête days; general strikes in the trade, or in those bodies on which the work of the trade is dependent, which affect the execution of the work, but to the exclusion of

[105] Including:
4. civil commotion, local combination of workmen, strike or lock-out affecting any of the trades employed upon the Works or any of the trades engaged in the preparation, manufacture or transportation of any of the goods or materials required for the Works;
5. compliance with the Architect's instructions:
6 the Contractor not having received in due time necessary instructions, drawings, details or levels from the Architectfor which he specifically applied in writing provided that such application was made on a date which having regard to the Completion Date was neither unreasonably distant from nor unreasonably close to the date on which it was necessary for him to receive the same;
7. delay on the part of Nominated Sub-Contractors or Nominated Suppliers which the Contractor has taken all practicable steps to avoid or reduce;
8.1 the execution of work not forming part of this Contract by the Employer himself or by persons employed or otherwise engaged by the Employer;
9. the exercise by the Government of any statutory power which directly affects the execution of the Works by restricting the availability or use of labour which is essential to the proper carrying out of the Works or preventing the Contractor from, or delaying the Contractor in, securing such goods or materials or such fuel or energy as are essential to the proper carrying out of the Works;
10.1 the Contractor's inability for reasons beyond his control and which he could not reasonably have foreseen to secure such labour as is essential to the proper carrying out of the Works; or
10.2 the Contractor's inability for reasons beyond his control and which he could not reasonably have foreseen to secure such goods or materials as are essential to the proper carrying out of the Works;
11. the carrying out by a local authority or statutory undertaker of work in pursuance of its statutory obligations, or the failure to carry out such work;
12. failure of the Employer to give in due time ingress to or egress from the site of the Works,;
13. the deferment by the Employer of giving possession of the site.

[106] AFNOR: Article 7.5.1.1.

[107] In accordance with the provisions of Law 46-2299, 21 Oct. 1946, and subsequent revisions (Article L-771-2 of the Code du Travail).

periods of strike affecting only the particular project.[108] The category also includes for the period to be adjusted in the event that variations to the work are required by unforeseen work. Article 8.1, *Modification aux Travaux* , provides for variations that may be required of the contractor and their evaluation, and the formalities for instructing variations require written instructions that particularise the effect of such changes on the times for execution.[109] The reference to unforeseen work is applicable to work of three types: work ordered by the employer as a result of an administrative order or a judicial or arbitral decision secured by a third party, emergency work affecting stability, and work carried out as nominated expenditure. In respect of each of these, time is extended upon justification for it by the contractor, but not where there has been fault on the part of the contractor.[110]

The second category is extension for the employer's delays. Within this is Delay in payment[111] under which the contractor is prohibited in any circumstances from suspending work on account of default in payment, but, by the proviso, only if he has not given at least 15 days' notice in advance by registered letter to the employer and the *maître d'oeuvre* . The time impact is that the employer is then made liable for the consequences of all interruption resulting from any failure to abide by his obligations, and in particular any repercussions which it might have on the execution of works of others. Other factors are delays in fulfilling administrative requirements, delays arising from instructions or the lack of their provision after request.

The broad result sought to be achieved by these two standard forms is much the same, but it is the interposition of the opinion of the architect in the mechanism under the English form where the difference lies. Likewise in the FIDIC conditions; while the qualifying events for an extension are simply stated,[112] and must be such as fairly to entitle the contractor to an extension, the determination of the extent is by the engineer, whose decisions and opinions are expressed in the contract between employer and contractor to be

[108] AFNOR: Article 7.5.1.2.

[109] AFNOR: Article 8.1.4.2.

[110] AFNOR: Article 7.5.1.3.

[111] AFNOR: Article 7.5.2.1.

[112] Clause 44. In short; extra work, any causes of delay referred to in the conditions, exceptionally adverse climatic conditions, employer's delays or "other special circumstances which may occur, other than through default of or breach of contract by the Contractor or for which he is responsible."

required to be given impartially, yet whose own default under his contract with the employer may have caused or contributed to delay, and much consequent cost.[113]

[113] An example within the actual terms of the FIDIC conditions is failure of the engineer to issue drawings in time, clause 6.4. The extent of the intellectual athleticism required of an engineer to satisfy the impartiality specified in the employer/contractor contract is seen from N.G.Bunni, The FIDIC Form of Contract, ch. 10.

[6] **TERMINATION**

1 Termination

A party aggrieved at not obtaining the performance bargained for may wish, in a general sense, to end further performance of a contract, and so far as possible restore the position to that before performance on either side began.

The view that he is not receiving the performance bargained for may derive from an actual breach of an identified obligation, or from the likely outcome of the continued manner of performance as against an obligation of which breach is determinable only subsequently, for example at completion. A straightforward reason for termination is the hardship an employer may suffer from having to accept or retain a lesser performance. As a remedy, it is in both common law and civil law subject to a recognisable permission, whether prospective or retrospective, and may prove speedier than the pursuit of performance or damages; but recognition of an ability to terminate is balanced by protective features towards the defaulting party, reflecting the degree of seriousness of default.

Assuming the existence of a breach the aggrieved party may wish first to refuse to pay or render counter-performance; or second, he may refuse to accept further performance; or third, he may already have performed his part and wish for restitution of his own performance. The parties will generally have provided for powers of termination in the express terms of their contract where a standard form has been used, but the nature and relationship of such to the law is material.

At common law the terms rescission or repudiation are used, and it permits the aggrieved party to rescind for non-performance merely by accepting the defaulting party's conduct as producing that result. It is therefore a remedy in the hands of the party asserting breach, subject to his action constituting a proper application of the law. Conversely, it has been pointed out that there is a greater reluctance in French law to allow such recourse to self-help in the widest sense of allowing a remedy without court intervention.[1]

2 *Résolution* and *Résiliation*

Prior judicial sanction is not a necessary element for the remedy of a defensive withholding of performance, *droit de rétention*, in French law for a party may rely on the *exceptio non adimpleti contractus*.[2]

The remedies of refusal to permit further performance and recovery of a party's own performance are in French law referred to by the same name, *résolution*, termination. This is where the aggrieved party wishes to secure a finite release from his obligation as opposed to the temporary and provisional result of the *exceptio non adimpleti contractus*, but without loss of the right to damages (as on a *nullité*). In civil law countries there is a sharp distinction between contracts performed by single acts on each side, instantaneous contracts, and successive contracts, including building contracts, which require continuing acts of performance over a period of time. In French law, the termination of the latter is referred to as *résiliation*, cancellation, which operates for the future.[3]

While an aggrieved party may terminate a contract the particular legal consequence on termination is moulded according to the circumstances of the case. Just as at common law French law has regard to such factors as the extent to which performance has gone and the loss caused by the default, and

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1 The French maxim "Nul ne peut se faire justice à soi-même", discussed in Béguin, Travaux de l'Association H. Capitant, 18, 1966, 41.

2 Treitel, Remedies for Breach of Contract - A Comparative Account. Considered under *Réception* and Payment.

3 J. Carbonnier, Droit civil, IV, Les Obligations, 273, 280.

the right to damages is not barred because the aggrieved party seeks to recover the performance that he has rendered under the contract.

The notable distinction of the French approach to termination from that of the common law is its judicial character.[4] Further, whilst *résolution* is a remedy for *inexécution* by virtue of a breach of contract that does not result from a fortuitous event, it is also the term used when the *inexécution* is brought about by *force majeure*. The history of the remedy has given rise to dispute as to its basis, but Article 1184[5] provides first, that a resolutive condition[6] is implied in all synallagmatic contracts where one party fails to perform his undertaking; second, that in such a case the contract does not terminate by operation of law, and the aggrieved party may claim either performance, or *résolution* and damages; and third, that *résolution* must be sought in legal proceedings, *en justice*.

Article 1184 does not specify the grounds for *résolution* ; it does not require the aggrieved party to show total non-performance, nor does it say that any non-performance will suffice. It prescribes how *résolution* must be sought, not when it will be granted.[7] That is a matter for the judicial process. In determining whether to grant *résolution* the court will have regard to various factors such as the defendant's degree of fault and the seriousness of

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[4] D. Harris and D. Tallon, Contract Law Today, Anglo French Comparisons. (1989).

[5] Article 1184: *"La condition résolutoire est toujours sous-entendue dans les contrats synallagmatiques, pour le cas où l'une des deux parties ne satisfera point à son engagement. Dans ce cas, le contrat n'est point résolu de plein droit. La partie envers laquelle l'engagement n'a point été exécuté, a le choix ou de forcer l'autre à l'exécution de la convention lorsqu'elle est possible, ou d'en demander la résolution avec dommages et intérêts. La résolution doit être demandée en justice, et il peut être accordé au défendeur en délai selon les circonstances."* [A resolutive condition is always implied in synallagmatic contracts to provide for the case where one of the two parties does not fulfil his undertaking. In such a case, the contract is not resolved by operation of law. The party in whose favour the undertaking has not been performed has the choice either to compel the other to perform the agreement, where that is possible, or of claiming *résolution* with damages. Résolution must be claimed by action at law, and the defendant may be granted further time depending on the circumstances.] The Article is in the section of the Code dealing with conditional obligations.

[6] Article 1183 defines a resolutory condition: *"La condition résolutoire est celle qui, lorsqu'elle s'accomplit, opère la révocation de l'obligation, et qui remet les choses au même état que si l'obligation n'avait pas existé. Elle ne suspend point l'exécotion de l'obligation; elle oblige seulement le créancier à restituer ce qu'il a reçu, dans le cas où l'événement prévu par la condition arrive."* [A resolutive condition is one which,when concluded, effects the revocation of the obligation, and which restores matters to the same position as if the obligation had never existed. It does not suspend the execution of the obligation; it only obliges the creditor to restore what he has received, in circumstances where the event provided for by the condition occurs.]

[7] The lack of legislative text as to the required circumstances for the remedy reflects its judicial character. An example of a specific application is from Article 1654 : *"Si l'acheteur ne paye pas le prix, le vendeur peut demander la résolution de la vente."* [If the buyer does not pay the price, the seller may claim *résolution* of the sale.]

the defect in performance. The formulation of the remedy as an implied resolutive condition followed Pothier,[8] but the operation of such a condition and the reasoning is hard to reconcile with the need for a court order. It has also been seen as a sanction for bad faith and as a means of compensation, but, while these may feature in decisions as to its grant, the generally accepted basis is in the reciprocal obligations of a synallagmatic contract.[9]

The court considering a claim for termination may grant or reject the claim, or grant the defendant a period of grace, *delai de grâce* , within which to perform his obligation.[10] Where the inexecution is other than total, as an abandonment, the matter is one for the discretion of the court within its *pouvoir souverain* for there is no legal crtiterion for distinguishing breaches sufficiently serious to justify the termination of the contract from those insufficient. At any time before termination has been ordered the party in default can prevent termination by offering to perform; indeed it seems he can do this while an appeal against an order for termination is pending.[11] Conversely, the aggrieved party is not barred from claiming termination merely because he has advanced a claim for performance.[12] Termination is not regarded as a usual remedy compared with damages.

The effect of the general requirement that a judgment for termination must be obtained is both that until such a judgment has been pronounced, the party in default is not deprived of his right to perform, and that the aggrieved party is not justified in refusing to perform his part, or in putting it out of his power to perform. On a judgment for *résolution* matters then have to be restored as if the contract never existed, so the effect is a

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[8] Traité des Obligations, 1761 (English translation by W. D. Evans, 1806) s. 672. Pothier sought to show a derivation from Roman law, but the supposed derivation is it seems not sound, A. Weill and F. Terre, Droit civil, Les Obligations, 4th Ed. 1986, s. 481.

[9] J. Carbonnier, Droit civil, IV, Les Obligations, 81, théorie juridique.

[10] Article 1184 al. 3. A similar, but more limited, provision as to period of grace in cases of sale is in Article 1655 par. 2. *"Si ce danger n'existe pas, le juge peut accorder à l'acquéreur un délai plus ou moins long suivant les circonstances."* [If this danger does not exist, the judge may accord the buyer a delay of greater or lesser length according to the circumstances.]

[11] J. Carbonnier, Droit civil, IV, Les Obligations , 272; the rule is criticised by G. Marty and P. Raynaud, Droit civil, II no.301. The reason for the continuing ability of the defaulting party to offer to perform whilst the proceedings are in train lies in the very powere of the court itself to adjudge that a further period for performance should be granted if performance is still possible. Such control

[12] Zweigert and Kötz, An Introduction to Comparative Law, p. 197 (pointing out that Italian law is different in that under Italian Codice Civile Article 1453 par. 2 and 3 performance can no longer be claimed after an action for termination has been brought).

retroactive annulment requiring restoration of benefits received,[13] but with this aspect inapplicable to building contracts, as continuing or instalment contracts, the judge on *résiliation* fixes the date at which cancellation takes place.

The general principle of French law is no doubt effective for the purpose of protecting the defaulting party; but it can be seen as commercially inconvenient.[14] The requirement of a judgment imposes delays and creates uncertainty as to whether the court will grant or refuse termination, or adopt an intermediate solution of giving extra time to perform.[15] To meet this, French law developed exceptions to the rule that termination requires an order of the court, but the inherent judicial character remains in the wariness with which automatic terminating conditions are regarded.

The most important of these is where a contract contains express provision for termination. The general validity of such provisions is undoubted. Article 1184 is not considered to contain a mandatory principle of public policy, so parties are, free to provide that in certain events the contract will be terminated by operation of law, *de plein droit*.[16] Care is needed in drafting such provisions as they are applied strictly, against parties relying on them.[17] A provision that in certain events the contract will be terminated may operate simply as a reminder of Article 1184 and not dispense with the requirement of a judgment.[18] Nor is a mere provision requiring performance within a fixed time (subject to Article 1657[19]) sufficient for that purpose.[20]

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[13] There are numerous exceptions to such retroactive operation, for example purchases of chattels by third parties in good faith are protected.

[14] Zweigert and Kötz, 199.

[15] The uncertainty of the reaction of the court is no less though than the uncertainty of litigation under common law as to whether there was a repudiation.

[16] J. Carbonnier, Droit civil, IV, Les Obligations,, IV, 273-274, 277. The freedom is subject to statutory exceptions.

[17] G. Marty and P. Raynaud, Droit civil, II no. 1105.

[18] J. Carbonnier, Droit civil, IV, Les Obligations, IV, 274.

[19] Article 1657: *"En matière de vente de denrées et effets mobiliers, la résolution de la vente aura lieu de plein droit et sans sommation, au profit du vendeur, après l'expiration du terme convenu pour le retirement."* [In the matter of sale of provisions and movable effects, *résolution* of sale takes place as a matter of law and without summons, to the benefit of the seller, after the expiration of the time agreed for the payment.]

[20] On this point French law differs strikingly from German and common law. This appears from the contrast between failure to pay and failure to take delivery at the stipulated time, and from the general provisions as to *délai de grâce* (period of grace).

If a contract provides that it is terminable by operation of law, the aggrieved party need not obtain a judgment but he may yet have to give a formal notice of default, *sommation* . For sales of land there is provision to this effect in Article 1656.[21] In other contracts the question is whether the provision for termination by operation of law dispenses the aggrieved party from all formalities, although it is common to insert a statement to this effect.[22] A properly drafted provision of this kind may, literally, appear to permit termination of a contract for some relatively minor default;[23] but an attempt to use it in this way may fail on the ground that it is contrary to good faith.[24] So qualified, such provision overcomes the inconvenience of the requirement of a judgment, while providing safeguards against more serious possible abuses of the right to terminate.[25]

Where a seller delays in delivery a judgment for termination must again be sought in the absence of an express contrary provision in the contract.[26] It is not easy to see why failure of the buyer to take delivery within the agreed time has been singled out for special treatment; and in practice it appears that sellers rarely exercise the right of peremptory termination confered by Article 1657 and notice of intention to terminate is usual. Certainly, unilateral rescission, which the common lawyer would equate with acceptance of a

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[21] Art 1656: *"S'il a été stipulé lors de la vente d'immeubles, que, faute du payment du prix dans le terme convenu, la vente serait résolue de plein droit, l'acquéreur peut néanmoins payer après l'expiration du délai, tant qu'il n'a pas été mis en demeure par une sommation; mais, aprés cette sommation, le juge ne peut pas lui accorder de délai."* [If it was stipulated at the time of the sale of realty that in default of payment of the price within the time agreed the sale would be cancelled as a matter of law, the buyer may nevertheless pay after the expiration of the time so long as he has not been put on notice by a summons; but after such summons the judge may not grant an extension of time.]

[22] Mazeaud, Leçons III no. 1011; Carbonier, IV 274.

[23] Mazeaud, Leçons III no. 947.

[24] J. Carbonnier, Droit civil, IV, Les Obligations, IV 277. An express provision will not entitle a seller to terminate the contract after the buyer's bankruptcy so as to obtain the return of materials delivered to the buyer and in effect secure a priority over other creditors; Law no. 67-563 of 13 July 1967 (JO 14 July p. 7059) article 61 par. I.

[25] Article 1657 relates to contracts for the sale of commodities or other moveables of which delivery is to be taken within a fixed time, and provides that at the end of the agreed time, if the buyer has not taken delivery, the contract may be regarded as terminated by operation of law at the option of the seller. The purpose of this rule is to enable the seller to take prompt measures to safeguard his position in the event of the buyer's default. He can dispose of goods that may deteriorate at once and so free his storage space and also protect himself against any fall in the market price of the goods. He can do this only if the contract specifies a date by which the buyer must take delivery, and such date is an essential condition of the sale. Without a term of this kind judgment is necessary.

[26] Article 1610: "Si le vendeur manque à faire la déliverance dans le temps convenu entre les parties, l'acquéreur pourra, à son choix, demander la résolution de la vente, ou sa mise en possession, si le retard ne vient que du fait du vendeur." [If the seller fails to make delivery within the time agreed between the parties, the buyer may, at his choice, demand rescission of the sale or his being put in possession, if the delay occurred only from an act of the seller.]

repudiation, is invoked at that party's risk and the courts exercise a subsequent strict control on this aspect, which remains exceptional.[27]

The Approach under AFNOR

The AFNOR provisions for termination are comprehensible to the common lawyer only in the light of the underlying legal framework, but with that understanding they provide a regime for termination to be effected in serious circumstances so achieving the same object as the JCT conditions. Termination *de plein droit*, without a prior judgment, and without a *mise en demeure* covers such matters as liquidation of either party.[28] Termination without a prior judgment may be effected by the employer for default of the contractor after formal notice in the event of abandonment of the site, but without notice, in the event of identified deception in respect of quality of materials, the performance of the works, or unauthorised sub-contracting.[29] Expulsion from the site would follow with judicial aid, and the employer retains the site equipment and secures title to non-perishable materials.[30] Termination without a prior judgment may be effected by the contractor for postponement or interruption due to the employer for more than 6 months,

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[27] Simler, La Résiliation unilatérale anticipée du contrat à durée déterminée, J.C.P., 1971, I, 2413; Beguin, Rapport sur l'adage 'Nul ne peut se faire justice à soi-même', Travaux de l'Association H. Capitant, 18, 1966, 41.

[28] AFNOR 1991; article 20.1.1 Termination through defaults of one of the Parties. ["The contract may be immediately terminated upon default of one of the parties and without any judicial order :
- after formal notice in all cases where the Articles of the current C.C.A.G. or the C.C.A.P. envisage such termination.
- without formal notice in the case of 'collapse' duly recorded on the part of one of the parties. 'Collapse' is that which give rise to total or partial inability to manage one's affairs, whether final or temporary, and particularly by judicial order, liquidation of assets, insolvency, voluntary winding-up or cessation of trading."]

[29] AFNOR 1991: article 20.1.2, Termination for Contractor's Default. ["20.1.2.1 The contract may be immediately terminated without any judicial order, for default by the contractor:
- after formal notice in the event of abandonment of the site,
- without notice, in the event of identified deception in respect of the quality of materials, the quality of performance of the works, or in the event of sub-contracting or sub-letting of the works contrary to the provisions of article 2.6."]

[30] AFNOR 1991: article 20.1.2.2, Consequence of Termination for Default of the Contractor. ["If the termination is pronounced by the Employer on the grounds of default by the Contractor, under the circumstances set out in articles 20.1.1 and 20.1.2:
- the Contractor subject to such termination, may be expelled from the site, and must then vacate it of his workman and leave it clean and tidy, by order of the *Tribunal de Grande Instance*, or the *Tribunal de Commerce* in the event that it has been so referred.
- the employer shall be entitled to retain any site equipment and installations and their value shall be brought into account after deduction for depreciation. The employer shall also acquire ownership of non-perishable materials purchased on payment by instalments, provided he pays the balance of their price."]

whether continuous or in shorter periods.[31]

The parties provide their own code, attributing the seriousness to the circumstance and upon its occurrence excluding the necessity for prior judicial sanction. Fault is the essence of this code including in it insolvency, but under French law dissolution of the contract may take place where failure of performance is not due to the defendant's fault. If performance of one party's obligation becomes impossible through *force majeure* , the other party's obligation may well be extinguished, but while this is not based on a resolutive condition its effect is to operate prospectively, as on *résiliation* applicable to building contracts and not retrospectively, as on *résolution* , and it excludes a claim for damages.[32] It is possible for parties to include an express resolutive condition providing for termination in the event of non-performance irrespective of fault, and AFNOR 1991 reflects this in the ability to terminate without court order and without obligation as to compensation where force majeure renders continuation of the work impossible.[33] Except in this respect, the financial consequences in damages of the default giving rise to the termination are brought into the accounting between the parties for the work completed.[34]

AFNOR 1991 still leaves scope for termination under the sanction of a court order for by its article 20.3 "Where a party has failed to perform his contractual obligations in circumstances other than provided for under articles 20.1 and 20.2, the other party may seek termination under Article 1184 of the Code Civil". These circumstances would include delay. The discretionary power of a French court to grant an extended period of time for

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[31] AFNOR 1991; article 20.1.3, Termination for Default of the Employer. ["Postponement or interruption due to the Employer over more than 6 months, whether continuous or in shorter periods, shall entitle the Contractor to terminate for default of the Employer."]

[32] J. Carbonnier, Droit civil, IV, Les Obligations, 271-272, 278.

[33] Also on the death of the contractor. AFNOR 1991; article 20.2, Immediate Termination without compensation. ["20.2.1 The contract may be immediately terminated without any judicial order in the following circumstances:
- death of the Contractor, save that, where applicable, the employer may accept any offers from his estate to continue the work.
- force majeure rendering continuation of the work impossible."]

[34] AFNOR 1991; article 20.4, Consequences of Termination. 20.4.1 Ascertainment of the State of the Work. ["On termination under articles 20.1 and 20.2, the work completed at the date of termination shall be ascertained. Payment for such work shall be made according to their degree of completion, after deduction of any compensation due."]

performance,[35] the *délai de grâce*, within which to perform when considering a claim for termination, simply requires the court to have regard to the circumstances in deciding whether to grant it.[36] It fulfils a similar function as the *nachfrist* under German law where failure to perform does not without more entitle the aggrieved party to refuse to accept late performance or to terminate. While performance is possible a notice, *nachfrist*, requiring performance within a stated time (being a reasonable time) must be given. While the *délai de grâce* can only be granted judicially, the *nachfrist* must be set by the creditor; and whereas the *délai* is discretionary the *nachfrist* is a mandatory requirement. Both are comparable with the result of notice makng time of the essence in respect of default by delay, and contrast with the general principle in English law that termination of a contract on the ground of default may be effected simply by a notice to that effect given by the aggrieved to the defaulting party.

A right to cancel a contract except by mutual consent runs counter to broad principles of French law, so in theory if a party purported to cancel, the other could refuse to accept the cancellation, perform and claim the sum agreed. In relation to the *contrat d'entreprise* the important exception was introduced by Article 1794,[37] and it remains, namely that the person for whom the work is being done can cancel it unilaterally on paying damages to the other party, which include expenses incurred and loss of profit. AFNOR incorporates particular reference to this.[38]

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[35] Article 1184 par 3: "La résolution doit être demandée en justice, et il peut être accordé au défendeur un délai selon les circonstances." [Résolution must be requested at law, and the defendant may be granted an extension of time according to the circumstances.]

[36] In the case of sales of land one restriction is imposed by Article 1655: no *délai* can be granted on a claim for termination if it puts the seller in danger of losing the subject-matter of the sale and the price. Article 1655: *"La résolution de la vente d'immeubles est prononcée de suite, si le vendeur est en danger de perdre la chose et le prix. Si ce danger n'existe pas, le juge peut accorder à l'acquéreur un délai plus ou moins long suivant les circonstances. Ce délai passé sans que l'acquéreur ait payé, la résolution de la vente sera prononcée.* [The cancellation of a sale of realty is decreed at once if the seller is in danger of losing the thing and the price. If this danger does not exist, the judge may accord the buyer agreater or lesser extension according to the circumstances. Such delay having expired without the buyer having paid, the cancellation of the sale is decreed.]

[37] Article 1794: *"Le maître peut résilier, par sa simple volonté, le marché à forfait, quoique l'ouvrage soit déjà commencé, en dédommageant l'entrepreneur de toutes ses dépenses, de tout ses travaux, et de tout ce qu'il aurait pu gagner dans cette entreprise."* [The employer may terminate the contract, at his own instance, even though the work has begun, upon compensating the contractor for all his expenses, all his works, and all that he would have profited out of the undertaking.]

[38] AFNOR 1991, article 20.1.4, Termination by the Employer. ["Where the Employer terminates in circumstances within Article 1794 of the Code Civil then the compensation to be paid to the Contractor shall be calculated according to its provisions."]

Requirement of fault

In French law fault is material for two purposes. First, the remedy of termination available under Article 1184 depends on the presence of fault,[39] which seems clear from the fact that Article 1184 provides for termination and damages. Fault is a requirement for the latter and no distinction is drawn between them as to the basis of liability. Second, termination is in principle a judicial remedy, available at the discretion of the court. In exercising that discretion, one of the principal factors which the court takes into account will be the degree of the defendant's fault. For example, the court may be influenced by the fact that the defendant acted in bad faith: termination is more likely to be granted against one who knew of defects in the subject-matter of the contract than against one who did not.[40]

There is nothing in Article 1184 which indicates how the discretion is to be exercised, and very little control is exerted by the reviewing courts.[41] The *juges du fond* are subject to control if they apply wrong principles, but it seems that even fewer principles control the exercise of discretion here than in relation to damages.[42] Certainly some of the grounds which control the remedy of termination at common law have been held not to be grounds for controlling a decision to allow termination, and normally, the evaluation of the seriousness of the default and the decision whether it is serious enough to justify termination are not overridden. In civil law systems, the right to terminate a contract on account of qualitative defects in the subject-matter is not usually said to be restricted to cases in which the defect is of a serious nature. It may in practice be so restricted in French law in the sense that termination in principle requires a judgment; and if the defect is not of a serious nature the court may refuse to order termination and instead order a price reduction.

[39] Marty and Raynaud, II, no. 300.

[40] J. Carbonnier, Droit civil, IV, Les Obligations, IV 272, 276.

[41] J. Carbonnier, Droit civil, IV, Les Obligations, IV 276.

[42] Mazeaud, Leçons III no. 1101.

At common law it is not fault that is material but contractual liability, albeit that deliberateness and the character of the breach may influence the view as to its seriousness. Common law draws no sharp distinction between delay and other forms of contractual default in that upon failure to comply with the terms of a contract as to time, the contractor is in breach and liable in damages, and the employer may also have express remedies under the contract. Whether the breach entitles the employer to accept that the contract is at an end is determined in accordance with the principle of repudiation; namely that the breach must be of the required degree of seriousness, of which time being of the essence is one application.[43]

Time being of the essence means that one or more stipulations as to time are conditions of which breach discharges the other party from the obligation to continue performance of his own promises,[44] and delay is treated as going to the root whatever the magnitude of the breach so permitting termination and recovery of damages.[45] Where time is not of the essence of the contract, or has ceased to be by waiver, the party aggrieved by delay can render it of the essence by giving notice to the other party calling upon him to perform within a specified period, which must be reasonable.[46] Once such a notice has been given he may terminate on failure to comply, and claim damages.[47]

Whilst time is generally of the essence in mercantile contracts, building contracts do not fall into this category, and the normal rule is that time is not

[43] United Scientific Holdings Ltd. v Burnley Council (1978) A.C. 904 (H.L.) at 944.

[44] United Scientific Holdings Ltd. v Burnley Council (1978) A.C. 904 (H.L.) at 927, 945. In English law there is no concept of time being of the essence of a contract as a whole: the question applies to the particular term. Time will not be considered to be of the essence unless: the parties expressly stipulate that conditions as to time must be stictly complied with; or, the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence.

[45] Charles Rickards Ltd. v Oppenheim (1950) 1 K.B. 616 (C.A.); Peak Construction v McKinney Foundations (1971) 1 B.L.R. 111 at 120 (C.A.).

[46] Graham v Pitkin (1992) 2 All E.R. 235 (P.C.). The notice making time of the essence can be compared with the German *nachfrist*, but there are important differences; first, the expiry of a notice making time of the essence only has the effect of giving the party who fails to receive performance within that time the option of terminating: unlike a *nachfrist*, the notice need not say that performance after that time will be refused, nor does it deprive the aggrieved party of the right to claim performance of the contract.

[47] Where there has been a waiver of the right to accept a repudiation based on a time failure, notice is then required making time of the essence in order to give rise to the ability to terminate; Charles Rickards Ltd. v Oppenheim (1950) 1 K.B. 616 (C.A.).

of the essence.[48] This is so where the contract includes provision for extending time and liquidated damages for delay,[49] but this does not prevent the parties by express term making time of the essence.[50] Extensions of time granted would not amount to a waiver.[51]

Determination of the contract itself is not ordinarily a feature of provisions in common law based standard forms, in that they confer rights to determine the employment of the contractor under the contract and utilise the continued existence of the contract for the regulation of the consequent rights and liabilities of the parties. Termination at common law requires that there be an expressed intention not to perform by the other party, which may be a current breach. Although contract provisions for determination may improve on this, and give grounds for determination that would not permit the remedy at common law, where the ground is not one that would be treated as repudiatory at common law the party relying on it is only entitled to such remedy as the contract provides.[52]

The most important single principle used to control the remedy of termination is that it is only available if the default attains a certain minimum degree of seriousness. Similar expressions are used in both common law and civil law to describe the seriousness of default or other failure in performance required to justify termination. The failure must be fundamental or essential;[53] it must go to the root of the contract;[54] it must be such that, had the aggrieved party known of it at the time of contracting, he

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[48] Lucas v Godwin (1837) Bing. N.C. 737 at 744.

[49] Lamprell v Billericay Union (1849) 3 Ex. 283 at 308; Felton v Wharrie (1906) H.B.C. 4th Ed. Vol. 2, 398 (C.A.).

[50] Peak Construction v McKinney Foundations (1971) 69 L.G.R. 1 (C.A.), where of the term "time shall be considered as of the essence of the contract on the part of the contractor" it was said at p. 120 "no doubt this gave the Corporation the right to determine the contract at the end of the 24 month period as extended by the architect."

[51] Nichemen v Gatoil (1987) 2 Lloyd's Rep. 46 (C.A.).

[52] Thomas Feather & Co. (Bradford) Ltd. v Keighley Corpn. (1953) 53 L.G.R. 30; where the right to determine for wrongful sub-letting carried the express remedies of absolute determination of the contract itself or a sum by way of liquidated damages. The exercise of the right to determine prevented success in the claim for damages for the extra cost of completing after the determination.

[53] This expression occurs most commonly where time is said to be "of the essence" of the contract.

[54] This phrase extends back in time at least to Glaholm v Hays (1841) 2 M & G. 257 at 268,

would not have entered into the contract;[55] it must deprive him of the substance of what he had bargained for;[56] it must frustrate his purpose in entering into the contract;[57] it must amount to a repudiation of the contract;[58] it must be such that further performance is of no interest to him;[59] it must constitute an important ground for termination.[60]

Anticipatory Breach

Wrongful repudiation does not itself discharge the contract, it gives an option to the affected party to terminate by his acceptance of the default as having that result,[61] but the common law doctrine of anticipatory breach, where the intent not to perform is shown before the due time for performance, has no precise counterpart in civil law.[62] In French law however a party may treat a contract as discharged without obtaining a prior judgment for termination in cases of declared refusal by the other to perform.[63] He runs the risk that his course of action may be treated as wrongful if the court subsequently finds that it was unjustified, but it will not be wrongful merely because he acted without first securing judgment. The

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55 Code Civil Article 1636.: *"Si l'acquéreur n'est évincé que d'une partie de la chose, et qu'elle soit de telle conséquence, relativement au tout, que l'acquéreur n'eût point acheté sans la partie dont il a été évincé, il peut faire résilier la vente."* [If the buyer is ousted from only part of the thing, and it is of such consequence relative to the whole that the buyer would not have bought without the part from which he was ousted, he may have the sale voided.]

56 Hongkong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha, Ltd., (1962) 2 Q.B. 41 at p. 70.

57 Universal Cargo Carriers Corp. v Citati, (1927) 2 Q.B. 401.

58 Mersey Steel and Iron Co. v Naylor Benzon & Co. (1884) 9 A.C. 434 (H.L.).

59 Germany BGB ¶¶ 280 par. 2, 286 par. 2, 325 par. 1 sent. 2, 326 par. 2.

60 Germany BGB ¶¶ 626.

61 "If one party to a contract repudiates it ... the innocent party has an option. He may accept that repudiation and sue for damages ... whether or not the time for performance has come; or he may if he chooses disregard or refuse to accept it and the contract remains in full effect. " Lord Reid in White & Carter (Councils) Ltd. v McGregor (1962) A.C. 413.

62 Civil law systems do not appear to recognise that anticipatory breach may render a defendant liable in damages or to termination before the time at which performance under the contract was actually due. But they nevertheless do give certain special effect to what a common lawyer calls anticipatory breach. Those special effects are apparent in relation to the machinery of termination, as seen for example in the AFNOR provisions identified above. An example from Italy is that there may be a termination if it becomes apparent that work is not begun in time or its progress is unduly delayed , albeit that such right is exercisable only after the lapse of an additional period of time and a warning of the likelihood of terminaton if the delay is not overcome. Codice Civile Article 1662: "Inspection of the work in progress. The customer has the right to check the progress of the work and to insoect the condition thereof at his own expense. When, in the course of the work, it is ascertained that performance is not proceding in accordance with the conditions established by the contract and according to the standards of the trade, the customer can establish a suitable time limit within which the contractor must conform to such conditions; if such time limit expires without results, the contract is terminated without prejudice to the right of the customer to be compensated for damages.", Trans. Beltramo. Longo, Merryman.

63 J. Carbonnier, Droit civil, IV, Les Obligations, IV 272.

effect of the doctrine is to enable an aggrieved party to claim damages even before performance has actually become due. Similarly, an aggrieved party who accepts an anticipatory breach is then generally entitled to terminate the contract, and this is assumed in English discussion of the doctrine.[64]

The option to pursue the contract and not to accept a wrongful repudiation must have limits, comparable to those circumstances considered on attempted enforcement of performance against an owner. Wrongful repudiation by an employer would pose similar problems where an innocent contractor sought to press ahead,[65] but the requirements of co-operation,[66] and a legitimate interest in performing the contract rather than claiming damages would be absent, and in any event the risks inherent in such a course renders the factual basis unlikely.[67]

Seriousness of Breaches

Certainly in the building contract field the test of whether the breach goes to the root is often the most useful.[68] Failure by an employer to give possession is regarded as a repudiatory act.[69] Interference with possession may not be repudiatory,[70] but, in general, wrongful acts which render completion impossible will be. Failure to pay one out of a number of instalments is not ordinarily sufficient but more may amount to a repudiation.[71] On the contractor's side, although a breach consisting of negligent omissions or bad workmanship where the work is substantially completed does not go to the

[64] The argument in Hochster v De la Tour (1853), 2 E. & B. 678 makes no sense unless this assumption is made.

[65] Notwithstanding that in White & Carter (Councils) Ltd. v McGregor (1962) A.C. 413 per Lord Reid "It is ... impossible to say that the appellants should be deprived of their right to claim the contract price merely because the benefit to them as against claiming damages and re-letting ... might be small in comparison with the loss to the respondent."

[66] It was specifically recognised in White & Carter (Councils) Ltd. v McGregor that the appellants could perform their part of fixing the advertising to the litter bins without the need for the cooperation of the respondent.

[67] It was doubted in London Borough of Hounslow v Twickenham Garden Developments Ltd. (19710 CH. 233, whether the option of insisting on performance, identified in White & Carter (Councils) Ltd. v McGregor, was intended to apply where the contract is being performed by doing acts to the property owned by the party seeking to determine it.

[68] Repudiation is a drastic conclusion which should only be held to arise in clear cases of a refusal, in a matter going to the root of the contract, to perform contractual obligations; Lord Wilberforce in Woodar Investments Ltd. v Wimpey Construction (U.K.) Ltd. (1980 1 W.L.R. 277 (H.L.) at 283.

[69] Roberts v Bury Improvement Commissioners (1870) L.R. 5 C.P. 310.

[70] Earith & General Contractors Ltd. v Manchester Corporation (1958) 108 L.J. 655.

[71] Payment of only £10,000 out of £24,000 then due was held to constitute a repudiation in Lep Air Services Ltd. v Rolloswin Ltd. (1973) A.C. 331 (H.L.) at 344 and 353 .

root of the contract in an ordinary lump sum contract,[72] it is possible that omisssions or bad work can be repudiatory where their nature and gravity shows an intent or inability substantially to perform his obligations.[73] Refusal to carry out the work, or abandonment without lawful excuse is repudiatory,[74] but unless it amounts to a refusal or inability to carry out the contract, simple delay on the part of a contractor does not amount to a repudiation.[75]

Performance on time as an obligation is measured against the date for completion of the work, but more difficult is the measurement of performance during the work. If the sole obligation is to complete by a certain date or such date as extended, no breach even would exist before that date, albeit that the signs that there will be a breach may be apparent in advance of the date.[76]

Where, under English law, parties have provided for a completion date then a slow pace of work not resulting in a failure to complete in due time will be unlikely to be a breach of contract at all.[77] The question as to an obligation on a contractor to exercise due diligence will ordinarily be dealt with by express terms, for without such a term there is likely to be difficulty in implying such a term so as to give rise to damages for its breach prior to the date for completion. It would find a place though in questions relating to an express right to determine. Nevertheless a failure to exercise due diligence to such a degree as amounted to refusal or abandonment or something going to the root of the contract would ordinarily amount to a repudiatory act. The point was made in rejecting an attempt to imply a term of due diligence and expedition into a contract where there were key dates for the contractor to complete the manufacture of the gates for the Thames Barrier, where there was also a variation in costs clause based on indices applicable to the dates of

[72] Hoenig v Isaacs (1952) 2 All E.R. 176 (C.A.).

[73] Sutcliffe v Chippendale and Edmondson (1971) 18 B.L.R. 157 at 161. This was the first instance decision giving rise to Sutcliffe v Thackrah (1974) A.C. 727 (H.L.).

[74] Mersey Steel & Iron Co. Ltd. v Naylor Benzon & Co. (1984) 9 App. Cas. 434 (H.L.).

[75] Felton v Wharrie (1906) H.B.C. 4th Ed. Vol. 2, 398 (C.A.).

[76] Intermediate dates for parts of the works may be expressly provided for under the schemes of both the JCT 1980 and the AFNOR 1989 forms. Under JCT 1980 use of the Sectional Completion Supplement achieves this object, and AFNOR article 7.2.2 provides that intermediate periods for the execution of the certain works may be fixed. By this means a series of completion dates during the whole work may be achieved.

[77] Greater London Council v Cleveland Bridge and Engineering Co. Ltd. (1984) 34 B.L.R. 50 (C.A.).

commencement of manufacture and a readiness for despatch:

> " ... what is due diligence and expedition depends, of course, on the object which it is sought to be achieved. If one is obliged to achieve a certain object within twelve weeks, it may be necessary to exercise much more speed than if your only obligation is to produce it in twenty four weeks or indeed in four years. The same applies to diligence. You cannot have diligence in the abstract. It must be related to the objective."[78]

Express provisions for determination

Determination clauses are viewed under English law as in the nature of forfeiture provisions and construed strictly, particularly as to compliance with procedural requirements,[79] and an invalid determination may amount to a repudiation.[80] Just as under AFNOR 1991 the JCT 80 conditions provide for determination where the contractor is in financial difficulties, and on the relevant event his employment is automatically determined.[81] The categories of default by the contractor are suspension before completion; failure to proceed regularly and diligently; refusal or neglect to comply with written notice from the architect requiring removal of defective work or materials;and, failure to comply with the provisions prohibiting assignment, or sub-letting without consent, but there are inserted elements that emphasise seriousness. The requisite default is "if without reasonable cause he wholly suspends ...", and the refusal or neglect has to be such that "the Works are materially affected".[82]

Such default does not lead immediately to the right to determine for it is the

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[78] Parker L.J. in GLC v Cleveland Bridge and Engineering Co. Ltd. "... It is contended, however, that if a manufacturer who has four years in which to complete a piece of equipment which could take as little as ten months to complete, begins to do the job at the beginning of the period, he is obliged, nevertheless, still to complete within the period in which it could have been completed. I ask myself why ...".

[79] Hill (J.M.) & Sons Ltd. v London Borough of Camden (1980) 18 B.L.R. 31 (C.A.).

[80] Architectural Installation Services Ltd. v James Gibbons Windows Ltd. (1989) 46 B.L.R. 91.

[81] JCT 80; clause 27.2. The events include bankruptcy and the appointment of an administrative receiver. The employment may be reinstated and continued if the employer and contractor and his trustee in bankruptcy, liquidator, or receiver agree.

[82] JCT 80; clause 27.1.

architect who has then to give notice specifying the default,[83] and if the contractor continues the default for fourteen days after the notice or at any time repeats it then the employer may give notice determining the employment.[84]

The architect is not interposed in a determination by the contractor where the events that may lead to it are employer defaults of non-payment within fourteen days of issue of a certificate, and interference with or obstruction of the issue of a certificate; and suspension of the whole or substantially the whole of the uncompleted work for a period,[85] by reason of certain events. These may well involve default by the architect, and features that impose seriousness have the seeds of tripartite dispute in them. The events are: architects instructions relating to documentary discrepancies, variations and postponement, unless "caused by reason of some negligence or default of the contractor ..."; the contractor not having received necessary instructions, drawings and the like from the architect in due time for which he specifically applied neither too early or too late; delay in work by the employer; opening up to inspect and testing unless the result shows non-compliant work; and failure by the employer to give the requisite access. On a determination the scheme provides for the rights and liabilities of the parties, mutual accounting including loss and expense.[86]

Whilst under French law the strict approach of the courts to termination may render enforcement of express resolutive clauses subject to the requirement of good faith, the JCT80 itself reflects a similar caution in imposing a proviso on determination by both employer and contractor that

[83] In English law, ordinarily a notice by which the right to terminate is exercised does not have to be in any particular form. It need not even specify the ground on which the contract is terminated. If the ground stated in the notice does not in law justify termination, the notice may nevertheless be valid so long as a ground which does justify termination actually exists; Boston Deep Sea Fishing and Ice Co., Ltd. v Ansell (1888) 39 Ch.D. 339 (C.A.) (employment); Taylor v Oakes, Roncoroni & Co. (1922) 38 T.L.R. 349 (K.B.) and 517 (C.A.) (sale of goods).

[84] JCT80 clause 27.1. The employer's notice has to be given within 10 days of the continuance or repetition. In English law, ordinarily a notice by which the right to terminate is exercised does not have to be in any particular form. It need not even specify the ground on which the contract is terminated. If the ground stated in the notice does not in law justify termination, the notice may nevertheless be valid so long as a ground which does justify termination actually exists; Panchaud Fréres S.A. v Etablissement Général Grain Co. (1970) 1 Lloyd's Rep. 53 (C.A.).

[85] JCT80, clause 28.1. The form suggests one month, but careful advance consideration of the period is required, for this may be wholly inadequate where a technical difficulty arises which requires suspension.

[86] JCT80, clauses 27.4 and 28.2.

their notices "shall not be given unreasonably or vexatiously".[87] Determination by both employer and contractor under JCT80 is not exclusive in the sense that the scheme is "without prejudice to any other rights or remedies which the ... may possess" so leaving open the application of acceptance of a common law remedy. [88]

The JCT forms also provide for the ability of the employer to postpone any work to be executed under the contract and for the financial effects to be assessed and certified as loss and expense, together with a right for the contractor to determine his employment after due notice where the carrying out of the whole or substantially the whole of the uncompleted works is suspended by reason of such a postponement for a continuous period the length of which is open to prior agreement by the parties (with a suggested period of one month).[89] A right of termination is equally provided to the contractor in AFNOR.[90] If the duration is postponed for 3 months on more. However neither the German BGB nor the VOB standard form[91] provide any rule for unilateral variations of the duration of the works.

The achievement of proper, contractually complying work by remedial work during the currency of the contract period poses problems without the assistance of particular standard conditions of contract, with the owner in England ordinarily left to a remedy in damages. In Italy the *Corte di Cassatione* , while recognising that a suspension of work by the employer stops the contract time for completion running against the contractor and entitles him to a postponement of the completion date, concluded that the duration of a suspension ordered by an employer did not have this effect where it was to allow other contractors to execute work which ought to have been done by the contractor but which he had failed to implement.[92]

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87 This relates the reaction of determination to the event relied on for it in the context of a reaonable employer or contractor in the instant situation; John Jarvis Ltd. v Rockdale Housing Association Ltd. (1986) 36 B.L.R. 52 (C.A.).

88 In the case of an employer's repudiation the "well settled" rule that a contractor may opt to recover on a quantum meruit may be invoked; Chandler Bros. v Boswell (1936) 3 All E.R. 179, and Lodder v Slowey (1904) A.C. 442, and although doubt is cast on this in Keating on Building Contracts, 5th ed. the point was applied, without argument, in Lusty v Finsbury Securities Ltd. (1991) 58 B.L.R. 66 (C.A.).

89 JCT 1980, clauses 23.2 and 28.1

90 AFNOR 1989, article 7.

91 Verdingungsordnung fuer Bauleistungen, the Contractual Procedure for Building Works.

92 Florio v Region Sicily. Court of Cassation, 7th May 1987, No. 4216 (1987) Foro It. Mass. 1987.

While each of English and French laws and the standard forms examined shows an aim towards a similar end, the means of achieving it requires more than a transposition of terms. Under FIDIC, comparable financial difficulty may be achieved by the contractor being "deemed by law unable to pay his debts as they fall due", but, apart from the dependency on the engineer's opinion as the requisite event for termination (and that including an opinion that the contractor has repudiated the contract) the effect is to "terminate the employment of the Contractor without thereby releasing the Contractor from any of his obligations or liabilities under the Contract, or affecting the rights and authorities conferred on the Employer or the Engineer by the Contract."[93]

This potentially qualifies the French concept of *résiliation* under which the parties are released from their future obligations, but even so the parties are not excluded from recourse to Article 1184 and the view of the court as to the circumstances, whether or not the engineer opined as to repudiation. The result of the use of such conditions under French law would be the creation of the very uncertainty which a unified from of contract may be desired to achieve. A further example is the importation of the concepts of unforeseen reasons and impossibility as employer defaults,[94] so invoking the spirit of *force majeure* but with the result of compensation to the contractor, contrary to its ordinary legal effect.[95]

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[93] FIDIC, 4th, clause 63.1 Default of the Contractor. "If the Contractor is deemed by law unable to pay his debts as they fall due, or ... ... or if the Engineer certifies to the Employer ... that, in his opinion, the Contractor: (a) has repudiated the Contract, or (b) without reasonable excuse has failed (i) to commence the Works in accordance with Sub-Clause 41.1, or (ii) to proceed with the Works, or any Section thereof, within 28 days after receiving notice ... , or (c) has failed to comply with a notice ... or an instruction ... within 28 days after having received it, or (d) despite previous warning from the Engineer, in writing, is otherwise persistently or flagrantly neglecting to comply with any of his obligations under the Contract, or (e) has contravened (the prohibitions on sub-contracting), then the Employer may, after giving 14 days' notice to the Contractor, enter upon the Site and the Works and terminate the employment of the Contractor without thereby releasing the Contractor ...".

[94] FIDIC, 4th, clause 69.1. Default of Employer. "In the event of the Employer: ... (d) giving notice to the Contractor that for unforeseen reasons, due to economic dislocation, it is impossible for him to continue to meet his contractual obligations ... the Contractor shall be entitled to terminate his employment under the Contract by giving notice to the Employer ...".

[95] FIDIC 4th, clause 69.3. Payment on Termination. "... in addition to the payments specified in Sub-Clause 65.8, the Employer shall pay to the Contractor the amount of any loss or damage to the Contractor arising out of or in connection with or by consequence of such termination."

1 Delegation

The delegation of performance by subcontracting is an inevitable facet of construction and applicable rules derive from whether a workman is precluded from engaging others or is obliged to perform work personally. A contract conditional on personal execution is not expressly characterised in civil law systems,[1] although it appears implicit from provisions for termination upon death or supervening incapacity of the workman that personal execution was a condition,[2] for a contract is then extinguished if personal aptitude was decisive.[3]

The ability to employ others to execute work differs from an entitlement to delegate the work whether in whole or in part by sub-contracting,[4] and the

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1 The ability of a workman to employ servants for executing work does not give rise to any special rules in the codified systems relating to work and labour. It appears that the nature of the work permits the conclusion that a workman is allowed to let another do the work even where a code starts out with a proposition to the contrary, for example in the Austrian Civil Code Article 1165.

2 As in the French Code Civil Article 1795 and the Italian Codice Civile Article 1674.

3 In Italy the *Corte di Cassassione* determined that employment of third persons is implicit in the nature of a contract for work and labour, *appalto*, whenever those persons are rendered part of the organisation of the enterprise, Cas. 11th Apr. 1972 no. 1125, rep. Foro 1972 v Appalto no. 2. In reality the considerations as to whether third persons may be employed arise in cases concerning vicarious liability for negligent acts or omissions of servants or agents committed in the course of their engagement, Italian Codice Civil Articles 1228, 2049.

4 There is provision in the Italian Codice Civile, Article 1656, whereby the workmen must not engage a subcontractor, *sub appaltatore* , unless authorised, so creating a premise that without such authorisation the work has to be carried out by the enterprise organised by the contractor. Behind this rule is the notion that the workman, even though owing an obligation to have the work done, *far fare* , nevertheless has to execute that work in an enterprise organised by himself. It appears, however, by reference to agency, sub-contracting is regarded as having been deemed to have been authorised if the contract or nature of the legal relationship so permits.

approach of civil law jurisdictions equates with English law.[5] This approach is:

> "There is a well known division of Contracts for work and labour ... One class is where the work and labour can, on the true construction of the Contract, only be performed by the contracting party himself or by some staff that he employs. The other class is where ... it is to be inferred that it is a matter of indifference whether the work should be performed by the contracting party or by some sub-contractor whom he employs."[6]

Ability to secure performance of a contract by another does not relieve from liability for the default of the sub-contractor,[7] and no question of assignment arises which would create a direct contractual relationship between the employer and the sub-contractor.

2 Particular Aspects

The growth of specialised subcontractors and the consequent necessity for extensive sub-contracting in the construction industry has led to the development of numerous special rules in standard conditions. This legitimate reason for sub-contracting finds effect in France where the AFNOR conditions disentitle the contractor from sub-letting all of the work entrusted to him, *la totalité des travaux*, but prohibit sub-letting of part only without the employer's authorisation.[8]

The comparable term in JCT 80 is that "The Contractor shall not without the written consent of the Architect (which consent shall not be unreasonably

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[5] As applied in British Wagon Company v Lea & Co. (1880) 5 Q.B. 149. The plaintiffs agreed to let railway wagons to the defendant, and agreed to keep them in repair. After the winding-up of the plaintiffs, and in answer to the claim for rent, the defendant contended that the plaintiffs were consequently incapacitated from performing the contract; but "... where a person contracts with another to do work or perform service, and it can be inferred that the person employed had been selected with reference to his individual skill, competency, or other personal qualification ... Personal performance is in such a case of the essence of the contract ... But this principle appears ... inapplicable in the presence instance ... as we cannot suppose that in stipulating for the repair ... the Defendants attached any importance to whether the repairs were done by the company, or by any one with whom the company might enter into a subsidiary contract to do the work", Cockburn C.J. at p. 153.

[6] Davies v Collins (1945) 1 All E.R. 247, per Lord Greene at 249; but Some obligations may be personal, whilst others arising out of the same contract may be performed vicariously, Southway Group Ltd. v Wolff (1991) 57 B.L.R. 33 (C.A.).

[7] As emphasised in Moresk Cleaners Ltd. v Hicks (1966) 2 Lloyd's. Rep. 338.

[8] AFNOR 91, article 2.6.1.1: ["The contractor awarded the contract shall not be entitled to sub-contract all of the works entrusted to him. Article 2.6.1.2: The contractor shall be entitled to sub-contract the performance of certain parts of his contract, provided he has previously obtained the employer's acceptance of each subcontractor and approval of the terms of payment for each subcontractor."]

withheld) sub-let any portion of the Works ...".[9] Unreasonable withholding would doubtless reflect the circumstances, size and nature of the particular works within the contract, and whilst sub-contracting the entirety is not expressly prohibited, assignment without consent is.[10]

The requirement for employer's consent barely restricts the scope of sub-contracting in real terms, but in England problems have derived not so much from an unauthorised subcontract rather from the nomination of sub-contractors by employers.[11] The difficulties to which nomination has given rise are a reflection on the employer's desire to identify the work of the sub-contractor, ascertain and control the price of the sub-contracted work as well as to exercise control over the personality of the subcontractor and the terms on which his work is to be done, all of which are then set against the background of no contract between the employer and the sub-contractor. Indeed, the provisions for nomination in JCT 80 extend to prohibit the main contractor from executing the work of the nominated subcontractor. That this attempt at control, without contract, of the nominated subcontractor by the employer has given rise to difficulty is in no doubt,[12] even to the extent of leaving the employer without a remedy in the case of defective materials where the suppliers' subcontract limited his liability to the main contractor.[13] This has led to yet another body of rules in the shape of direct

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[9] JCT 80, clause 19.2.

[10] JCT 80, clause 19.1 "Neither the Employer nor the Contractor shall, without the written consent ot the other, assign this Contract." A distinction was drawn between the right to have the contract performed, which was proscribed by the clause , and, the fruits of performance, which were not, in Linden Gardens Trust Ltd. v Lenesta Sludge Dispoals Ltd. (1992) 57 B.L.R. 57 (C.A.), but this was not the effect of the clause as decided by the House of Lords at (1993) 3 W.L.R. 408.

[11] A view of this, and of the position in Swiss law, is seen in P. Gauch and J. Sweet, Selected Problems of Construction Law: An International Approach.

[12] Especially the requirement on the employer to re-nominate, and bear the financial consequences where the first nominated sub-contractor "drops out" even by repudiation; Bickerton v N. W. Metropolitan Regional Hospital Board (1970) 1 W.L.R. 607 (H.L.), cricised in Hudson's Building Contracts, 10th ed. Post Bickerton development in Percy Bilton Ltd. v GLC (1982) 1 W.L.R. 794 limited its potential impact by allowing the employer to recover liquidated damages for delay from the main contractor where the delay resulted from the need to re-nominate, but the effect of the concession as to the non-applicability of an extension of time provision and the dictum as to the ability of the main contractor to refuse to accept a re-nomination where the period for such work went beyond the original period, have left scpoe for exploration. The subject is discussed in I.N. Duncan Wallace, Construction Contracts - Principles and Policies, ch. 21.

[13] Gloucestershire County Council v Richardson (1969) 1 A.C. 480; and also Fairclough Building v Rhuddlan Borough Council (1985) 30 B.L.R. 26 (C.A.).

subcontractor/employer warranties.[14]

A constant complaint of sub-contractors is difficulty in obtaining payment, whether with or without the impact of "pay when paid" clauses which place sub-contractors in an unattractive position.[15] Urging sub-contractors as to terms which they should not accept carries hope beyond reality;[16] equally, devising a scheme to curb the worst excesses,[17] and achieving legislation to implement it is an unlikely prospect in England.

3 The French Law of 1975

The attempt to improve the position has been in France, where a distinctive and important feature is the regulation of sub-contracting by legislation introduced in 1975,[18] to the intent of ensuring that subcontractors would be paid notwithstanding bankruptcy or insolvency of the main contractor. The *Loi* sought to accomplish this through rights for subcontractors to be paid directly by the employer in public works contracts, and, for private works, for subcontractors to have a right of direct action against the employer. This intervention which overrides the essence of the contractual chain adopted for the organisation of the construction process deserves analysis.

In France sub-contracting remains a topical subject in the spheres of further legislation, and the application and development of existing legislation in the courts. The regulation by the 16 articles of the *Loi* of 31st December 1975 as amended where one finds the attempt to organise and better the lot of subcontractors has created its own dificulties. The attempt is nonetheless valiant even though the subcontractor's position carries problems also

[14] Even without the standard forms of direct warranty between employer and sub-contractor the law provides a direct warranty upon which a subcontractor or supplier may be liable in circumstances where an assertion or promise is made which might be regarded as made with an intention to result in legal relations, but which in fact results in the employer engaging the sub-ontractor or supplier through the medium of a main contractor; Shanklin Pier Ltd. v Detel Products Ltd. (1952) I K.B. 854, and Wells (Merstham) Ltd. v Buckland Sand and Silica Ltd. (1965) 2 Q.B. 170.

[15] G.N. Prentice, Remedies of Bulding Sub-Contractors against Employers, 1983, 46 M.L.R. 409.

[16] Sensible suggestions as to unacceptable conditions in I.N. Duncan Wallace, Construction Contracts - Principles and Policies, are prefaced by "if their bargaining power permits".

[17] J.A. Fisher, The Solution to Sub-Contractors Payment Problems. (1990) 6 Constr. L.J. 287. The scheme for adjudication on witholdings by main contractors, for example in the JCT Nominated Sub-Contract form adds a layer for argument.

[18] Loi No. 75-1334 of 31st December 1975, as amended.

reflected in England.[19]

The building world may not readily resort to written agreements and this reticence frequently leads to general principles being eroded by tacit understandings, even in the case of express terms, instanced by the preservation in French law of implied *réception* despite the formal wording of Article 1792-6.[20] In the private house-building sector over 60% of work is sub-contracted,[21] and some 76% of the subcontractors do not have written contracts.[22] This renders regulation difficult, and subcontractors are the first victims of a main contractor's failure. The subcontractor's liability is not touched by the legislation of 1985, nor by the *Loi* of 4 January 1978. As he is excluded from the guarantee system and building insurance, the subcontractor is subject to general principles of law *vis-à-vis* contractors up the chain whilst the main contractor is subject to a different legal regime as against the employer.[23]

The French legislation suggests a policy standpoint, regarding subcontractors as in an intrinsically weak position, requiring them to be protected in society against the economic might and legal power of dominant contractors. Such vision is encouraged by the economic weight of the subcontracting sector,[24] and whose interests are adopted by politicians of all hues.[25] The legislation has been bedevilled by practical difficulties in application, and also subject to

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19 G.N. Prentice, Remedies of Bulding Sub-Contractors against Employers, 1983, 46 M.L.R. 409.

20 Although the text states that acceptance is a "legal act", pre-supposing the existence of a written document, decisions of the Cour de Cassation allow the valid existence of an implied acceptance; (Cass. Civ. 3, 16th July 1987 Bull. Civ. III. no. 143 p. 84, Cass. civ. 3, 12 Ocober. 1988 Bull. III no. 137 p. 75) which can be deduced for example from payment of the price and entry into the property; Cass. civ. 3, 12 October 1988, above, and, 7th December 1988 Rev. Dr. trim. 1989 213).

21 Perhaps even 100%, as the private house "builder" is sometimes content to sign the contract and then subcontract the entirety of the works.; B. Sablier and L.E. Caro, Guide to subcontracting in construction, édition du Moniteur, 26.

22 In spite of the protection which the legislation endeavours to afford by procedures for direct payment and direct action, every year more than 10,000 workmen find themselves in a delicate position as a result of being unable to recover debts estimated at 800 million francs. 38% of subcontractors say that they have had to face up to unpaid debts during recent years; according to the remarks of J P Lapadu, President of the National Council of Subcontracting in the Building Industry, Mon T. P., 20 April 1990, 79.

23 The terms of Article 1793, providing the domain of the fixed price lump sum contract, have been held not to apply to a sub-contract agreement between two enterprises. Civ. 3, 15th February 1983, Bull. civ. III, 44.

24 Representing 13% of the turnover of building and public works in 1989; according to an inquiry by the board of economic and international affairs of the Ministry of Supply (Mon. T. P., 9th March 1990 p. 11) which confirms previous identical figures.

25 In recent years the number of written questions set down by parliamentary members about subcontracting has never been less than seven per member on average.

the forces of development through the courts and a desire for modification. Consequently the rules for liability for and payment of subcontractors, and sub-subcontractors, are at the heart of developments which render any exposition "rather fragile".[26]

The *Loi* is divided into four sections: (1) provisions of general application, articles 1 to 3; (2) provisions establishing the right to be paid directly by the employer in public works contracts, articles 4 to 10; (3) provisions establishing the right of direct action against the employer in private sector contracts, articles 11 to 14; and, (4) miscellaneous provisions, articles 15 and 16.

Provisions of general application

Sub-contracting is defined by article 1 as "the activity by which a contractor entrusts by a sub-contract, and under his responsibility, to another person called a subcontractor, all or part of the performance of a construction contract, *contract d'entreprise* , or public works contract, *contrat du marché public* , entered into with an employer". Whilst including the sub-contracting of "all or part" of a public or private works contract, a contractor may only sub-contract part of works[27] to which the *Code de Marchés Publics* applies.

Before subcontractors can claim direct payment from or bring a direct action against an employer, public or private, the employer must first have been informed of the price and conditions of payment that were agreed between the main and subcontractor, and article 3 provides that "the contractor who intends to perform a (construction) contract or public works contract by resorting to one or several subcontractors shall, at the time he enters into, and during the entire duration of such contract or public works contract, cause each subcontractor to be accepted and the conditions of payment of each subcontractor to be approved, by the employer; the main contractor is required to communicate the subcontract or subcontracts to the employer

[26] H. Perinet-Marquet, Subcontracting in French Law, (1991) I.C.L.R. 315.

[27] Article 2, and Circular of 7th October 1976.

when the latter requests them".[28]

The sanction for default on either condition is that the contractor remains bound to the subcontractor, but he may not invoke the subcontract against the subcontractor. From this it might seem that the contractor would be bound to pay the subcontractor for his work on the basis of the subcontract but may not claim under it against the subcontractor for breach, and this approach was adopted by some courts in the early 1980's.[29] The *Cour de Cassation* refuted this, concluding that whilst article 3 only permits a non-authorised subcontractor to rescind the contract he must accept liability for his work when he requires payment for his services;[30] he may not "at the same time take advantage of the subcontract to obtain payment for his works and reject it to escape from his contractual obligations".

This aspect is all-embracing in the chain for by article 2 a subcontractor is constituted the main contractor vis-a-vis his subcontractors, so a subcontractor's election to subcontract requires obtaining acceptance of the sub-subcontractor as well as approval of the conditions for payment.

Contracting out is prohibited by article 7, for any waiver of the right of direct payment is void, and such rights subsist even though the contractor is in bankruptcy or reorganisation. Article 12 is in like terms for the right of direct action. Additionally article 15 forcefully adds that "clauses, stipulations and arrangements, whatever their form, the effect of which would be to frustrate the provisions of this Law, are null and void". The effect of this must be that any "pay when paid" clause making payment to the subcontractor conditional on receipt of payment by the main contractor from the employer would be void.

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[28] Reflected in AFNOR 91, article 2.6.1.2. In discussion of the legislation a proposal for a requirement that the subcontract itself be ratified by the employer was rejected in favour of a duty on the contractor to cause each subcontractor to be accepted and the conditions for paying him to be approved by the employer; Flecheux, La loi no. 75-1334 de 31 deecembre 1975 relative à la sous-traitance, JCP, 1976 I 2791, para. 10.

[29] Trib. de grande Instance, Toulouse, 16th January 1980 D, 1981 114; Dongi 20th December 1983 Gaz. Pal. 1984. As if article 3 provided that where the subcontractor has not been accepted nor the conditions of payment agreed by the employer, the main contractor shall nevertheless be bound as regards the subcontractor, but cannot invoke the subcontract against the subcontractor's interest.

[30] Cass. civ. III 13 April 1988 Bull. III no. 72 & 73 p. 41 & 42, D 1988 521 note Dubois.

The right to direct payment

The direct payment provisions, only applicable to public works contracts,[31] require contractors at the time of tender to inform employers of the nature and amount of all services which they intend to subcontract.[32] This is independent of the requirement in article 3 to cause each subcontractor to be accepted by the employer.

Under such contract the accepted subcontractor whose conditions of payment have been approved has the right to be paid directly for the execution of that part of the contract for which he is responsible.[33] The payment procedure is that the documents intended to support a direct payment by the employer must be delivered to the contractor who has 15 days from receipt either to endorse on them his acceptance, or to give notice to the subcontractor of his refusal, with reasons. After this period, the contractor is deemed to have accepted those of the documents which he has either not expressly accepted or refused,[34] enabling direct payment to be made by the employer. Sub-subcontractors engaged on public works projects are it seems limited to a right of direct action against the main contractor.[35]

The two principal conditions, acceptance and consent, which have to be obtained concurrently,[36] may be secured by the contractor indicating at the time of the tender the nature and total cost of each undertaking he envisages sub-contracting,[37] and proposing subcontractors. The provisions of the *Loi* as to acceptance and consent apply only at the time of conclusion of the main

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31 Whether with the state, a regional organisation, *collectivité locale,* or a public establishment or enterprise.

32 Article 5. The right to direct payment is limited to subcontractors of the contractor having contract with such bodies; Circular of 7th October 1976 relating to the reform of subcontracting in public works contracts.

33 Article 6.

34 Article 8.

35 This is not clear, and has been the subject of debate.

36 Acceptance without consent is not valid; CE, 13th June 1986,Pas de Calais D1986 obs. Terneyre.

37 The requirements of article 5 are repeated in articles 47 and 257 of the Code des Marchés Publics.

contract,[38] and may be fulfilled implicitly by the acceptance of the tender.[39] The third condition, the documentation, was the subject of subsequent decrees. If there is no response within the 15 days the subcontractor must then refer to the employer who must then give notice to the main contractor to supply proof that his rejection is justified within 15 days.[40]

The direct payment has two quantum limitations; first, subcontractors can only recover the amount in the subcontract as fixed in the main contract. This though is subject to its revision and being brought up to date,[41] and payment for additional work not foreseen by the subcontract but which was, in practice, absolutely necessary can be required.[42] Second, the employer cannot be forced to pay more than the amount contained in the main contract, constituting his contractual liability.[43]

The risk of subcontractors rights to direct payment being prejudiced by claims of contractor's creditors is limited by article 9 stipulating that contractors are only entitled to pledge as security such part of public works contracts undertaken which they perform personally. Accordingly, subcontracting reduces available security up to the limit proportionate to the part intended to be sub-contracted.[44] Non-observance of this aspect has its problems in that the *Conseil d'Etat* decided that security for a part of the contract which was over the proportionate limit nullified acceptance and prevented direct

[38] CE, 24th October 1986 Mon T. P. 12 Dec. 1986 p. 52.

[39] Article 2 of the Code des Marchés Publics, specifies that if a request for acceptance and consent was made at the same time as the offer or tender, the granting of the contract includes acceptance; in other cases, where no response is made within 21 days from receipt of the request the subcontractor is deemed to be accepted and qualified. Where however an employer invites the main contractor to proceed to a formal declaration of subcontractors and requires the contract to be split up lot by lot he cannot be regarded as having impliedly accepted the subcontractors. (CE, 2nd June 1989 Vill de Boissy Saint Léger D.1990 228, note Benabent, AJDA 1990 p. 720, note Sablier and Caro Mon. T.P. 2 Mar. 1990 p. 55, Gaz. Pal. 1-2 June 1990 p. 17).

[40] Article 8, as affected by the decrees of 29th August 1977 and 27th November 1979. The Court of Cassation has acknowledged that the main contractor can be validly forced, in *equité*, to hand over the detailed accounts supplied by the subcontractor; Cass. civ. 8 Mar. 1989 Mon. T. P. 30th June 1989 p. 50.

[41] This revision and bringing up to date must have been provided for in the document containing the agreement; CE, 28th January 1987, Communes de Vayres Gaz. Pal. 87, Mon. T. P. 30th April 1987 p. 51.

[42] CE, 13th February 1987 Société Ponticelli Freres Mon.T.P. 12th June 1987 p. 59; B. Sablier and J.E. Caro "Additional works carried out by subcontractor without a service order", AJDA 1988 p. 15.

[43] A decision the Conseil d'Etat suggests a further point: that the holder of the contract has not already paid the subcontractor a sum equal to the subcontract even if the basis for the payment was outside the contract, CE, 3rd November 1989 SA Jean Michel Dr. Adm 90 46, Mon. T. P 13 April 1990, D. 1990 Som. comment 244, obs. Terneyre. Otherwise expressed, the payment made on whatever basis to the subcontractor by the main contractor extinguishes to that extent the right to direct payment belonging to the said subcontractor. Such a stipulation does not appear anywhere in the Act.

[44] Also article 1351 of CCAG.

payment because one of the preconditions was absent.[45] The subcontractor was consequently penalised for the contractor's default.[46] In the *Cour de Cassation* a banker in funds unsuccessfully opposed direct payment in similar circumstances with the court simply treating the excess security as not available.[47]

Direct payment is far from a certainty for a subcontractor, but it is a useful potential protection available, and to expedite matters subcontractors may have recourse to a *juge des référés* .[48] Apart from the direct payment provisions, there is it seems a possibility of rendering the employer liable to the subcontractor.[49] It is not an easy route. It presupposes fault on the part of the employer, who, being sufficiently aware of the subcontractor's part in the works, did not insist on the requirements for subcontractors being imposed on the contractor.[50] Proof that the employer had actual knowledge of the nature of the subcontractor's part in the works and his relationship with the contractor is essential,[51] and relief is likely to afford only a partial remedy to a subcontractor who will undoubtedly be himself at fault for having accepted work without verifying his position.

The right of direct action

For private works to which the right to direct payment is inapplicable, article 12 provides those subcontractors accepted by and whose conditions of payment have been approved by the employer, with the right of direct action against the employer, if the contractor does not pay sums due under the subcontract within one month after having received from the subcontractor

45 Namely compliance with the *Loi* ; CE, 2nd June 1989 SA Phinelec D. 1990, 229 obs. Benabent. AJDA 1989 720 obs. Sablier and Caro, Gaz. Pal. 1–2 June 1990, Paris p. 17.

46 "Quite paradoxical"; H. Perinet-Marquet, Subcontracting in French Law, (1991) I.C.L.R. 315.

47 Cass. com. 20th June 1989 JCP 1989 IV, 318; a decision on transfer of debt, being an similar solution to that which follows on a direct action.

48 C. Adm. d'appel Bordeaux 19th December 1989 M Cousseron JCP 90 IV, 125 which allows payment in advance of the whole of the debt. It is a form of summary judgment.

49 H Perinet-Marquet, Subcontracting in French Law, (1991) I.C.L.R. 315.

50 Article 2 of the Code des Marché Publics and Article 2.1.49 of CCAG forbid secret subcontracting.

51 It has been held sufficient that the subcontractor was accepted without agreeing his conditions of payment,CE 13th June 1986, Pas de Calais D. 1986 IR 424, obs. Terneyre; and that a subcontractor featured on the list supplied by the contractor to the employer, CE, 6th May 1988 Ville de Derain Dr. Adm. 1988 no. 376. Attendance at site meetings may give rise to the degree of knowledge, CE 23rd April 1986 Sté Helias Paysage Gaz. Pal. 25th Dec. 1986 p. 13, and 6th November 1985 Commune de Checy, AJDA 1986 p. 42, note Sablier and Caro.

a formal notice to pay.[52]

Every subcontractor, regardless of tier, has the benefit of the right of direct action against the employer depending on that vital point of acceptance and approval by the employer of his conditions of payment. In this respect, the right of direct action differs from the right to direct payment where the benefit is restricted to subcontractors of the main contractor. Where the right of direct action is invoked, the obligations of the employer are limited to those which he still owed to the contractor on the date of his receipt of a copy of the formal notice to pay sent to the contractor.[53]

As under the right to direct payment, the risk of subcontractors' rights being prejudiced by contractor's creditors is addresed by article 13-1 prohibiting contractors from transfering or pledging amounts receivable under the contract with the employer except for amounts due for work which executed personally.

Direct action against a private entity would not afford such protection as direct rights against public bodies, but the risk of reduced protection in private works is substantially ameliorated by article 14. This requires that payment of subcontractors be secured by a joint and several, *solidaire* , guarantee obtained by the contractor from approved establishments following conditions fixed by decree.[54] Alternatively, if it is not secured by guarantee, then by the contractor's delegation to the employer of performance of the contractor's payment obligation towards subcontractors under Article 1275 of Code Civil extending to the value of services to be rendered by subcontractors. The guarantee is preferable for subcontractors with its protection against bankruptcy of both employer and contractor, but cost renders contractors disinclined to procure them.

Contractors, reportedly, frequently failed to implement the requirements of article 3 to enable subcontractors to enjoy the right of direct action or to

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[52] A copy of such notice is required to be sent at the same time to the employer.

[53] Article 13.

[54] These are ordinarily banks. As a transitional measure the guarantee could be obtained from one of the organisations on the list promulgated by Loi no.71-584 of 16th July 1971 in connection with retention guarantees (*retenues de guarantie*).

provide the necessary security, and an attempted remedy was an addition in 1986 of article 14-1 requiring the employer to intervene. If employers detect the presence on site of subcontractors who are not the subject of the article 3 obligations, notice must be given to the contractor to fulfil them; and if accepted subcontractors whose conditions of payment have been approved are not recipients of the delegation of performance of the contractor's payment obligation, then employers must require the contractor to verify the provision of the guarantee.

There have been and remain difficulties in operating these provisions which are being worked out in practice and which give rise to debate.[55] The straightforward premise, that subcontractors have the benefit of article 14 and that sums due from contractors will be guaranteed by bond unless payments due to subcontractors are assigned, is, on many views, little more than pious hope, in spite of the penalty of annulment of the subcontract.[56]

It is difficult to envisage contractors, who may have become reluctant to commit matters to paper, readily or easily adopting the strict formality of an assignment of payments or the cost of guarantees within article 14.[57] The mechanism of direct action under articles 12 and 13 only benefits those subcontractors with approved contracts and conditions of payment, for although this condition does not appear in the section on direct action but in article 3, courts have upheld employers' defences[58] to subcontractor actions upon absence of acceptance or approval.[59]

Forms of acceptance and approval have loomed large, with courts not necessarily assisting subcontractors. Nevertheless acceptance of subcontractors after the start of work, and just prior to institution of direct

[55] H Perinet-Marquet, Subcontracting in French Law, 1991, ICLR, 315.

[56] There is no hesitation in the courts in stating a subcontract is void when there is no guarantee as laid down by the Act, duly signed. Cass. civ. 3, 11th October 1989, Bull. III No. 189 p. 103, JCP 1989 IV 396, Gaz, Pal. 8–9th August 1990 annotated summaries p. 13.

[57] Article 14 has, it appears, only benefitted, at most, 20% of subcontractors; B. Sablier and J. E. Caro, Guide to Subcontracting in Construction, p. 109 et seq., and Mon. T. P. 11th August 1989, p. 33.

[58] The main contractor and his creditors may not raise the absence of acceptance and agreement of the subcontractor to prevent the employer's desire to pay the subcontractor directly, Cass. civ. 31st June 1988 Bull, Civ. III, no. 101, p. 57. This conclusion is not universal, CE, 2nd January 1989, Ville de Boissy St. Leger, D. 1990, 229, note Benabent.

[59] Cass. Mixte 13 March 1981 D 1981 509 note Benabent, JCP 1981 II 18568 concl. Toubas, note Flecheux, Rev. Dr. trim. 1981 225 obs. Malinvaud and Boubli.

action, has been recognised.[60] Implied acceptance of subcontractors by actions clearly showing the employer's will has also been acknowledged as compliance,[61] but not readily,[62] and implied acceptance is unlikely to attract the benefit of a summary result.[63]

By article 12 direct action is only available where the contractor fails to pay sums due under the subcontract within a month of receiving notice, and, to show this, it seems that it is necessary to commence action against the contractor,[64] but this is sufficient and further steps in pursuit are not required.[65] Even when all conditions are met and direct action is available, subcontractors' tribulations are not ended for that assured by article 13 is:

> "the payment corresponding to the services provided for by the subcontract of which the employer is effectively the beneficiary. The obligations of the employer are limited to those he still owes to the main contractor on the date of receipt of acopy of the notice provided for in the preceding article."

Application of this has allowed direct action for amounts due to the main

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60 Cass. civ. 3, 16th December 1987 Bull. II, no. 206, p. 122 Gaz. Pal. 26–27th February 1988 p. 13; Mon, T P. 8th April 1988 p. 57; Paris 25th May 1990 D. 1990 IR 163. Previously, a stricter test required acceptance and agreement prior to the execution of the works , Cass. civ. 3, 18th May 1982 D. 1982 IR 515.

61 Cass. civ. 3, 18th July 1984 Rev. Dr. trim. 1985, 59, obs. Malinvaud & Boubli, Cass Com. 27th February 1990, JCP, 1990, IV, 165.

62 It has been considered insufficient on the grounds of a purely "passive" attitude of the employer in situatons: where subcontractors came on to the work site , Cass civ. 3, 18th January 1986, Mon. T P 12th September 1986; Paris 5th November 1986 Rev. Dr. trim. 1987 p. 57 obs. Malinvaud & Boubli; Aix 26th February 1988 D. IR 1989, 358; where representatives were sent to site meetings, Cass civ. 3, 3rd October 1985 Rev. Dr. trim. 1986, 206; and, where there was tacit acceptance of work carried out by the subcontractor's factory, Cass com. 14th June 1988, JCP 1988 IV 297, Rev. Dr. trim. 1988, 461 obs. Malinvaud & Boubli, 27th February 1990 JCP 90 IV 165.The approach seems to be that any dispute as to agreement to the subcontractor constitutes a serious dispute which does not come within the power of the *juge des référés*, Cass. com. 4th July 1989 Bull. IV no. 212 p. 142 (a decision on another aspect of agreement in an action between main and subcontractor). The nature of the point appears comparable with a serious issue to be tried under RSC Order 14.

63 Trial judges have recognised tacit acceptance and agreement in situations: where works carried out for seven years were not contested by the employer, Agen 6th February 1984 JCP 1985 IV 85, Rev. Dr. trim. 1985 p. 59; where the employer spoke to the subcontractor to obtain details of his qualifications, Paris 6th February 1984 Rev. Dr. trim. 1985 p. 59; and where the subcontractor had taken part in site meetings and was included on the list of subcontractors authorised to take part in the works Paris 25th May 1990 D 90 IR 163.

64 Cass. civ. 3, 29th February. 1984 Rev. Dr. trim. 1984 313. Presentation of a bill of exchange upon maturity for payment in respect of works done cannot be considered as constituting a valid notice, Cass. com. 3rd July 1990, JCP 90 IV 336, D 90 IR 218.

65 A judicial summons against the main contractor is not required , Cass. civ. 3, 29th February 1984, Rev. Dr. trim. 1984 313, nor is the joinder of the subcontractor in any bankruptcy proceeding against such contractor, Cass. civ. 3, 29th February 1984 Bull. III no. 56.

contractor from the employer,[66] even if they are not directly linked to the subcontract,[67] but subcontractors' claims will be fully satisfied only if the total amounts claimed by all the subcontractors do not exceed the amounts due to the main contractor from the employer. If they do, then the amounts remaining due to the main contractor are divided among subcontractors joined in the direct action in proportion to that due to each.[68]

Direct action can be a significant weapon, particularly where utilised summarily, *en référé* , although the conditions of approval and acceptance are practical hurdles which produced amendments to articles 13–1 and 14–1. The effect of article 13-1 is to encourage contractors to provide the guarantee, *cautionnement personnel et solidaire* , required by article 14. It enables contractors to use as security the entirety of the monies due under the contract when first providing the guarantee, for otherwise the availability of monies for security is limited. In practice its application has rendered direct action more effective by penalising contractors' bankers.

The limiting of employers' obligations to those owed to the contractor on the date of receipt of the copy of the formal notice led to the point that the employer must be the main debtor at the time of the notice. If any assignment of debts or factoring had arisen before formal notice then the rights of the subcontractor would have been assumed by the assignee,[69] or factor.[70] The basis mirrors the English position of an assignee taking subject to equities.[71]

This position was modified by Article 13.1, introduced in 1981, and its application. The *Cour de Cassation* determined that whatever the date of the notice, any assignment of debts or factoring exceeding the amount due to the contractor could not be raised in defence against the subcontractor when

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[66] Even if the works ordered by the employer were carried out after the main contractor's bankruptcy, on instructions from the syndicate, Cass. com. 20th June 1989, JCP 1989 1V 318, Gaz. Pal. 25–26 May 1990, annotated summary p. 12.

[67] Cass. mixte 18th June 1982, D. 1983 221 note Benabent, Rev. Dr. trim. 1982 p. 515 obs. Malinvaud & Boubli.

[68] Cass. civ. 3, 11th February 1987 Bull. III no. 26, p. 16.

[69] Versailles 1st July 1987, IR 219, Rev. Dr. trim. 1988, p. 101 obs.. Malinvaud & Boubli.

[70] Cass. civ. 3, 25th March 1987; Mon. T.P. 3rd July 1987, p. 57.

[71] This being "subject to all rights of set-off and other defences which were available against the assignor" per james L.J. in Roxburghe v Cox (1881) 17 Ch. D. 520 (C.A.) at 526.

the required guarantee had not been supplied.[72] A gap remains in the desired protection of subcontractors, for despite article 13.1 direct action by subcontractors can only succeed if it precedes the discounting of a security issued by the main contractor,[73] because the transfer to the discounting bank renders the employer owing nothing further to the main contractor when subcontractors appear. This applies also on the bankruptcy of contractors where amounts due from the employer are sequestrated to benefit creditors.[74]

The legislation did not rest with limiting rights of main contractors. Employers' liabilities were reinforced. By article 14.1 employers must put main contractors in the position to comply with their liabilities immediately they aware of subcontractors on site who have not been accepted or without approved conditions of payment. Where a subcontractor is accepted and approved, but without the benefit of a transfer of payment, the main contractor must satisfy the employer that he has supplied a guarantee. There is a heavy onus on employers, for whilst this obligation is not reinforced by penalty the result of failure may mean either that an employer is liable to the subcontractor for damages,[75] or the subcontractor is able to take direct action where the conditions of acceptance and approval are not met.[76] Article 14.1 excluded from its ambit the construction of a private dwelling by an individual with a view to himself or his spouse or their immediate relations occupying it, but in this area subcontractors were particularly vulnerable, and in 1990 protection was introduced.[77]

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[72] Cass. com. 22nd November 1988 Bull. IV no. 317 & 318 p. 213, D. 1989 p. 212 obs. Benabent, Gaz. Pal. 23–25 April 1989 p. 8 obs Sablier & Caro; also, N. Peisse, Direct Action of Subcontractors in Competition with the law on Assignment of debts, Daily Gaz. Pal. 29th March 1989 p. 2.

[73] Cass com. 4th July 1989 Bull. IV no. 212 p. 142, JCP 1990 ed. N II p. 80 note Dubois. A. Benabent, The conflict between banker and subcontractor, Rev. Dr. trim. 1990 p. 149; A. M. Romani, Protection of subcontractors in private contracts entitled to direct action in a dispute against bankers holding transfers of debts, D 1990 Chr. p. 179; H. Synvet, New variations on disputes concerning bankers and subcontractors, JCP 1990 IV, 3425.

[74] Cass. civ. 3, 17th October 1990, D.1990 IR 254.

[75] TGI Paris 16th September1988 Rev. Dr. trim. 1989 358 obs. Malinvaud.

[76] Cass. civ. 3, 13th June 1990 D. 1990 J465, note Dubois. This case also decided that the 1986 decree, having added Article 14.1 to the 1975 Act, applied to contracts current at the time.

[77] The Loi of 19th December 1990. This was not brought forward as a general reform, even regarding payment, but limited to subcontractors under contracts for private houses.

The Amendment of 1990

The 1990 *Loi* begins at base, importing a required condition that subcontracts are subject to a written agreement made at the commencement of work. The document should consist of five statements: a description of the building work; the identities of the employer and guarantor; a description of the work covered by the subcontracting agreement; the agreed price and means of payment, particularly the time limit which should not exceed 45 days;[78] and the amount of any penalties due from the builder if payment is delayed.[79]

This new measure is criticised[80] on grounds that, apart from being restricted to the construction of private houses, its penalty is the criminal sanction of imprisonment for between two months and two years, or a fine of F.F. 8,000 to 125,000 for anyone engaged in building private houses[81] who does not make a written subcontracting agreement,[82] and further, that the requirement to send a copy of the subcontract agreement to the guarantee body, an essential condition to ensure that the guarantee recognises the existence of the subcontractor, does not extend to subject this body to penalty. The 1990 *Loi* is not thought to be the last word as it cannot resolve problems of payment of subcontractors in private housing or overcome difficulties relating to subcontractors' liability.

In wider terms there appears to be consensus that the whole legislative activitiy has been successful in public works contracts, and the direct payment procedure has it seems been widely accepted and applied.[83] This is not regarded as so in private works for, despite the 1986 amendment, concealed or disguised subcontracting is reportedly still widespread,[84] and subcontractors

[78] This period was reduced to 30 days by the Senate, despite reluctance on the part of the government.

[79] Copies of the subcontract agreements should be sent by the builder to the body obliged to supply the external guarantee of completion requirements by the *Loi*. In the Law of 1972 the builder needed only produce an "internal guarantee" relating to his own financial condition. This it seems is frequently used.

[80] H Perinet-Marquet, Subcontracting in French Law,. (1991) 8 I.C.L.R. 315.

[81] Whether built from plans supplied by the builder (Article L.231-1) or not (Article L.232-1).

[82] Article L.241-9. The legislators are themselves sceptical as to the effectiveness of such recourse to the criminal law, for this was the government's opinion according to a ministerial reply of 9th November 1987, Mon. T. P. 11th December 1987 p. 15.

[83] Sous-traitance: de la Theorie à la Pratique, Moniteur T.P., 17 th April 1987.

[84] That is, non-compliance with article 3; Réponse Ministerielle No. 6775; J.O. deb. Ass. nat. 16th October 1989 p.4588, cited in Jurisclasseur,, Construction, Sous-traitance, fascicule 206, para..23 ff. C.R. Seppala, French Law on Subcontracting, (1991) I.C.L.R. 78.

continue without the right of direct action and the security provided for. The sanction for failure to cause subcontractors to be accepted and the conditions of payment approved, that the main contractor cannot invoke the subcontract against the subcontractor, has proved ineffective, partly because some courts held open the route for contractors to pursue claims for defects in tort where they can establish fault of the subcontractor.[85]

4 Particular Liabilities under French law

A subcontractor entitled to the benefit of a building contract incurs as against the contractor a contractual liability,[86] without the necessity of proof of fault, and subject to the intervention of *force majeure* .[87] Nevertheless a subcontractor is not a guarantor subject to Articles 1792 *et seq.* of the Code Civil.[88] The 1978 *Loi* excludes subcontractors from the 10 year warranty period, and so liability for 30 years remains.[89] Article 1788 applies to subcontractors, as to any hirer of work, and the risks of the work remain with him for so long as he has not handed it over to the main contractor or another subcontractor.[90]

As between subcontractor and employer French law has been open to doubt, in much the same way as English law,[91] in that conflicting decisions in the *Cour de Cassation* leave the subcontractor's position uncertain. There is no doubt that the subcontractor, not coming within Article 1792-1, is not bound

[85] Commentators have also urged that contractors' obligations under article 3 should be reinforced with penal sanctions, or that the direct payment procedure be extended to apply to private employers. While prospective changes continue to be studied, which itself indicates a determination to succeed, no amendment has been introduced.

[86] Cass. civ. 3, 3rd October 1985 JCP 1986, 20601, note B M Bloch, 13th June 1990 D, 1990 IR 179.

[87] Where the Cour de Cassation refuses to take into account fault raised by a subcontractor, Cass. civ. 3, 29th October 1986 Mon T. P. 21 November 1986.

[88] Considered under Liability for Defects.

[89] Cass. civ. 3, 25th June 1985 Bull. III no. 102, 18th June 1990 D 1990 IR 179.

[90] Cass. civ. 3, 2nd November 1983, Rev. Dr. trim. 1984, 186 obs. Malinvaud & Boubli. Article 1788: *"Si, dans le cas où l'ouvrier founit la matière, la chose vient à périr, de quelque manière que ce soit, avant d'être livrée, laperte en est pour l'ouvrie, à moins que le maître ne fût en demeure de recevoir la chose."* [If, where the worker supplies the materials, the thing should perish, for whatever reason, before it is delivered, the worker bears the loss, unless the employer was in delay in accepting it.]

[91] Junior Books Ltd. v Veitchi Co. Ltd (1983) 1 A.C. 520, was classified as "unique"by the House of Lords in D. & F. Estates Ltd. v Church Commissioners for England (1989) A.C. 202 at 215, is no longer citable as authority for a general duty of care in tort in such circumstances, and is not followed even at first instance, Nitrigin Eireann Teoranta v Inco Alloys Ltd. (1992) 1 W.L.R. 498.

by the 10 year period of liability to the employer.[92] The question has become one of eliciting whether the subcontractor has a liability in tort, as to which there was little doubt[93] until within the last five years when the Commercial Court[94] and the First Civil Court[95] adopted the chain of contract as a premise in this area, concluding that when someone under a contractual obligation passes on to someone else the task of carrying out the obligation, the beneficiary only has the right to "an action, of necessity contractual, which he can exercise within the limit of his rights and the extent of the debt of the substituted debtor". Conversely, in the same year (1988) the third Civil Court of the *Cour de Cassation* acknowledged that there was a liability in tort for proven fault,[96] as has the *Conseil d'Etat* with regard to public works.[97]

The consequences of these two opposing conclusions are that whilst the subcontractor subject to liability in tort can only be proceeded against for actual fault his liability is not restricted in time to the 10 year limitation period; whereas under the chain of contracts principle the subcontractor is subject to a liability based on his contractual obligation, and although he is not subject to the 10 year period as between himself and the main contractor, because he is not within Article 1792, he does have the benefit of the limitation of liability to the period of 10 years after *réception* by virtue of that being the period of the guarantee to which the main contractor remains liable to the employer. Further he will have the benefit of any clauses restricting liability contained in both the main and the sub-contract.[98]

5 Application of the French law

The scope of application of French law of subcontracting depends both on the definition of subcontracting in the 1975 *Loi* and on the concept of public

[92] Cass. civ. 3, 20th June 1989, Bull. 1989 III no. 146, p. 80.

[93] Cass. civ. 3, 22nd January 1982, Bull. 82 III no. 164, p. 120.

[94] Com. 17th Feb. 1987 JCP 1987, II 20892 note Dubois, D. 1987, 543, note Jourdain.

[95] Cass. civ. 1, 8th March 1988, Bull. 1988 I no. 69 p. 46 confirmed by Cass. civ. 1, 21st June 1988 Bull. I no. 202, p. 141.

[96] Cass. civ. 3, 22nd June 1988 Bull. III no. 115 p. 63.

[97] CE, Nancy 16th Jan. 1990, Jurisdata no. 040430; CE, Grenoble 10th January 1990 Jurisdata no. 040159; 15th March 1989 Jurisdata no. 04105; CE, Angers 10th January 1989 Rev. Dr. trim. 1989 467 .

[98] CE, Nancy 16th January 1990 referred to above.

order. Subcontracting by article 1 is "the operation by which a contractor entrusts, by means of a subcontract, and under his liability to another person called a subcontractor, all or part of the completion of a building contract or public works contract agreed with the employer", and the *Loi* presumes no direct contractual link between the one who carries out work and the ultimate beneficiary of it. By any reasoning subcontracting presumes the existence of a main contract and is incompatible with employment or sale, and the essence is the entrusting of part of the performance of that contract.

A link of direct subordination between someone working on site and the main contractor would not give rise to the relationship of a subcontractor, even if wages are not paid directly by the latter. By contrast an agency making available temporary teams of workmen under the supervision of one employee and paid a lump sum is subject to the *Loi* of 1975.[99] The distinction between contracts of supply and subcontracting is less easy. Simply to supply building material or equipment does not come within the 1975 legislation, and will be regulated as appropriate either by the normal conditions of sale, guarantee in respect of hidden faults or possible application of clause 1792-4[100], or by its treatment as a hiring of goods as in a crane hire.

There is less clarity when the supply is specific to a particular project or has to be installed on site by the supplier. The point was avoided in rendering the existence of a subcontract conditional on a direct assumption of liability by the subcontractor in carrying out the works,[101] or on the completion of acts of production or service connected to the completion of the work being carried out on site.[102] The position has been reached it seems where the definition of a subcontractor is applied to anyone who carries out, even in a factory, a particular element of work for a specified site following special instructions under which there can be no substitution of any other product for that which has been ordered.[103]

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[99] Reims 7th March 1977 JCP 1978 IV, 325, Rev. Dr. trim. 1979 208 obs. Malinvaud and Boubli; but not if the workforce in question was not involved in the building contract.

[100] The criteria for applying this text are met and in particular the existence of an EPERS (element which can give rise to joint liability); on this point, H. Perinet - Marquet referred to above.

[101] Cass. civ. 3 17 Feb. 1982 Gas. Pal. 1982-2 p.221, Rev. Dr. trim. 1982 515 obs. Malinvaud and Boubli.

[102] Cass. civ. 3 18 Jan. 1983 Gas. Pal. 1983-1 p.136, Rev. Dr. trim. 1983 obs. Malinvaud and Boubli, Rev. trim. Dr. Civ. 1983 552 obs. Remy.

[103] Cass. civ. 3 5 Feb. 1985 Bull. 1985 III no. 23, Gaz. Pal. 1985 2 p. 248 obs. Jestaz, Rev. Dr. trim.1985 256 obs. Malinvaud and Boubli, Rev. trim. Dr. Civ. 1985 737 obs. Remy, D. 1986 J 499 note Huet.

The scope of the definition of a subcontractor has been extended considerably and encompasses the supply of specific framework,[104] the manufacture of locks in accordance with a special schedule of conditions,[105] the manufacture of pipes adapted to the requirements of contours and site[106] and even kitchen units built in accordance with precise instructions given by the employer.[107] The assembly of a travelling crane was even considered sufficient by one *juge du fond*,[108] but not the supply of units taken from existing stock.[109]

Accordingly the traditional characteristic element of a building contract in distinguishing a contract of sale, namely the predominance of work over supply does not apply to subcontracts. This criterion, well adapted to craftsmanship and small business, gives way to the demand for special orders, better suited to modern production processes. Changing the frontier of a subcontract in this way increases the protection of the manufacturing subcontractor, but has the disadvantage of limiting the guarantees available to the employer in respect of products. The legislature intended to make the manufacturer of a specific article liable under the 10 year guarantee applying to builders by virtue of Article 1797.4, but the producer, by becoming a subcontractor as against the employer, escaped not only the strict 10 year guarantee and the duty to insure, which is its corollary, but also any contractual liability. From this point of view, the extension of the scope of subcontracting upsets, at least in part, the balance sought by the 1978 legislation.

As an example of political will to grapple with the position of the subcontractor the French experience must be rated successful, and the determination evidenced by amending legislation is praiseworthy. The necessity though of forming a view as to where the balance of interests should lie renders a similar attempt in England unlikely, although the EC

[104] Cass. civ. 3, 5th February 1985 above, and 10th January 1986 Rev. Dr. trim. 1986 p. 363.

[105] Versailles 14. Jan 1988 D 1988 IR 41, Rev. Dr. trim. 1988 p. 209 obs. Malinvaud and Boubli.

[106] Cass. com. 20th June 1989 D 90 246 note Virossamy. The degree of exactness of installation or order tends to become one of the criteria to distinguish a building contract and a sale contract (Cass. Com. 4th July 1989 D 90 246 note Virossamy).

[107] Paris 25th May 1990 D. 1990 IR 163; and implied, Cass. civ. 3, 8th March 1989 Rev. Gen. Ass. Terr. 1989 620 obs. Bigot.

[108] TGI Bressuire 4th August 1987 Gaz. Pal. 5-6 April 1989 p. 11.

[109] Versailles 19th May 1988 D. 1988 IR 221.

Discussion Paper of June 1993 places problems of subcontractors firmly on the agenda.[110]

[110] The Discussion Paper is considered in Harmonisation, and Future Directions.

1 Basis for Liability

Whether concerned with an individual item of material or an aspect of workmanship or the totality of the project the starting point is the broad principle of the obligation to conform with the contract, whatever the nature of the defect or the other qualities of the completed work.[1]

The range of potential remedies for failure to conform may extend to seeking the performance of new work, the removal of the defective work, with or without replacement, termination of the contract, reduction of the price, and damages. The merits of each reflect the multitude of fact situations, but the stringency of the measures determine the criteria for availability and, possibly, a balancing of interests. Termination of the contract as opposed to reduction of the price depends on the nature or seriousness of the defect and may be weighed against the ability to achieve specific performance, which depends on the adequacy of damages. Equally the need or desire to pursue damages will be a reflection of the ease with which other remedies can be secured.[2]

French law regards the contract for services as ordinarily giving rise to

[1] In this there is a generic comparison with the law of sales for, as in the Uniform Law on the International Sale of Goods, the seller's obligation is to deliver goods "which conform with the contract" Article 19.

[2] In Germany damages or compensation for non-fulfilment, *schadensersatz wegen nichterfullung*, may be claimed if the defect in the work was caused by the workman's fault, but this is an alternative to the remedy of reduction in price or cancellation of the contract. They are true alternatives in that cancellation of the contract is regarded as extinguishing the contractual obligations and thus the ability to claim damages. The claim for reduction in price permits the contractual obligations to remain intact albeit that they are fulfilled on new terms.

obligations de moyen where fault is a requirement for liability.[3] This imposes a duty to engage in the promised activity to the required standard, but not so as to bring about the contemplated result. Fault is not an essential factor for liability where the obligation is to achieve a promised state of affairs, described as an *obligation de résultat* , or *déterminé* , as in the building contract.

Some contracts for services may impose both obligations. In this way the obligation to produce a result under a strict liability finds a boundary in respect of contracts for work and labour at a line created by the first obligation to deliver the work and the second, to preserve it, in particular as to goods of the employer upon which work is to be carried out. The obligation to deliver or redeliver, is usually regarded as part of the obligation to produce a specified result, but it is the second obligation that is classified as one of a promise of a diligent effort such that liability for transgression of such obligation requires fault.[4] The essence of the obligation is a promise to exercise all possible care, although the degree of care within the *obligation de moyens* may be extended or contracted having regard to the nature of the contractual obligation.

In England the distinction is made between the warranty, whether express or implied, breach of which does not require proof of fault, and the obligation to exercise reasonable skill and care. The point arose in *Greaves & Co. v Baynham Meikle & Partners* [5] where under a package deal contract the plaintiff contractors had undertaken the construction of a warehouse and engaged the defendant structural engineers to design the floor which cracked as a result of having insufficient strength to withstand particular vibration from stacker trucks. Whilst the trial judge had expressed himself in terms of a higher than ordinary duty as a result of the purpose for which the warehouse was to be used being made known to the engineers, the Court of Appeal re-emphasised that in the employment of architects and engineers, as with all professional men, the law does not usually imply a warrranty that he will achieve the desired result, only that he will use reasonable care and

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[3] J. Carbonnier, Droit Civil, Les Obligations Vol. IV, 257; and Article 1302.

[4] Articles 1137 and 1245.

[5] Greaves & Co. v Baynham Meikle & Partners (1975) 1 W.L.R. 1095 (C.A.)

skill;[6] but on the facts the common intention to design a warehouse fit for its purpose resulted in a warranty to that effect.

The performance required under the contract itself will generally have a separate existence from the standard to be imposed in carrying it out, when the latter will not be exhaustive of the extent of the obligations:

> "A contract gives rise to a complex of rights and duties of which the duty to exercise reasonable skill and care is but one. If I employ a carpenter to supply and put up a good quality oak shelf for me, the acceptance by him of that employment involves the assumption of a number of contractual duties. He must supply wood of an adequate quality and it must be oak. He must fix the shelf. And he must carry out the fashioning and fixing with the reasonable care and skill which I am entitled to expect of a skilled craftsman. If he fixes the brackets but fails to supply the shelf or if he supplies and fixes a shelf of unseaoned pine, my complaint agaist him is not that he has failed to exercise reasonable care and skill in carrying out the work but that he has failed to supply what was contracted for. He may fix the brackets and then go away for six months, but unless and until I accept that conduct as as repudiation, his obligation to complete the work remains."[7]

The basis of the isolated rules relating to defects of quality in building contracts found in the Code Civil was described by Pothier.[8] The *obligations du conducteur* were seen to arise out of the very nature of the contract for work and labour and were to execute the promised work, to carry it out in due time, to perform it well, and, to make good use of the thing supplied by the employer and to preserve them carefully. The third obligation, *l'obligation de faire bien l'ouvrage* , rendered anyone undertaking to do work bound to do it in compliance with the *lex artis*, and the *actio ex locato* could be brought if the work was defective, as well as if the workmen had failed to execute it.

From the outset the implied promise to possess and exercise the skill of his profession was attributed to every workman. Additionally, incompetence was

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[6] Approving the extent of the duty as set out in Bolam v Friern Hospital Management Committee (1957) 1 W.L.R. 582 at 586: "The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."

[7] Midland bank Trust Co. Ltd. v Hett, Stubbs & Kemp (1979) 1 Ch. 384, Oliver J.

[8] Oeuvres de Pothier IV, Part 7 (Du Louage d'Ouvrage).

to be regarded as the workman's own fault. This liability of the *conductor operis* had been stated in such absolute terms that prior to the Revolution Domat had revived the concept in the context of the law of sales,[9] which nurtured the strict liability of the *vendeur professionnel* under Article 1645.[10] By this a seller whose course of business is the selling of a certain product is deemed to be aware of its defect, being treated as a seller acting in bad faith.

Pothier concluded that in the first instance the workman had to remove the defect of quality which a court found to exist, and if he failed to do so within a period of time fixed by the court the employer was authorised to have the defect removed at the expense of the workman.[11] Further, the workman had to compensate the hirer for the damage caused by the defective work; and this was applicable both to the employer's goods upon which the work was being carried out as well as to other goods affected by the bad performance. The example included was of a badly constructed house which collapsed with the result that the contractor had to pay damages additionally for the loss of furniture that could not be saved.

Development of French law included this obligation to carry out the work *lege artis* implied into the primary obligation to execute the work by which the contractor promises a distinct result. It is the enterprise that carries with it *l'obligation de resultat* . Whilst the enterprise includes the status attributed to contractors promising to do work in conformity with the contract and corresponding to the standards of the trade, the obligation is not limited to the performance to that standard whatever the outcome and is greater than a mere promise of diligent effort in the enterprise.

The consequence of inferior quality in the case of defects, is that the promised result has not been achieved and the primary obligation not fulfilled, and

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[9] Domat, Les Loix Civiles dans leur Ordre Naturel, 1770.

[10] Article 1645: *"Si le vendeur connaissait les vices de la chose, il est tenu, outre la restitution du prix qu'il en a recu, de tous les damages et intérêts envers l'acheteur."* [If a vendor knew of defects in the article he is liable not only for the repayment of the price which he has received therefor, but also for all damages suffered by the purchaser].

[11] In his Treatise on the Law of Obligations, 1826.

that liability flows from such breach of contract irrespective of fault.[12] The only mode of escape is extraneous circumstance comprising *force majeure* , contributory negligence, *faute de la victime* , or intervention of a third party, *intervention d'un tires* , carrying the burden of proof.

This principle is applicable where *réception* , acceptance, of the work has not yet taken place, so leaving scope for a wider remedy than damages by the removal of the defect or the production of new work. This is the discretionary remedy of the *juges du fond* of *exécution en nature* ,[13] where the decision turns on feasibility on the individual facts. Where a defect cannot be entirely removed damages are available additionally, so the effect is a reduction of the price payable by the employer. The mechanism of deduction corresponding to the diminished value of the work may be regarded as available in circumstances where the repair of the defect is overwhelmingly costly or might cause damage to the work.[14]

The Code Civil contained few rules on defects in building contracts, so providing both the necessity and the opening for their development and subsequent amendment that is unsurprising in view of the march of time and complexity of the construction process.[15] The Code though, at its inception, instituted a decennial liability for defects which has remained ingrained in French law, around which amendments have been built, and, against which French reaction to the most recent proposals for harmonisation of liability in the construction industry is measured.[16]

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[12] In Germany the emphasis is on the primary obligation of the workmen to produce work which has the promised qualities and is free from defects, BGB ¶¶ 633. Delivery of work not meeting these requirements is not regarded as the proper fulfilment of the main obligation.

[13] Referred to under Performance and damages, Specific Performance.

[14] In Germany the practical need to deal with defects apparent in the work prior to completion found recognition in the right granted to the employer to fix an adequate time limit for the removal of such defects; BGB ¶¶634, also the Swiss Code of Obligations Article 366. The BGB enables employers to warn that upon inaction in removing defects the employer will cancel the contract or demand reduction of the price. The fixing of a period for the removal of defects is not required if removal is impossible or the contractor refuses, and the ability to require removal is affected by the question of economic reasonableness.

[15] In contrast with the original French codification, Germany had more explicit legislation. The former German Commercial Code (1861) and the Dresdner Entwurf (1865) provided a common basis in the law of obligations in the Federal Republic of Germany, in Switzerland and in Austria. In turn, Greece was much influenced by the German model, and Turkey adopted the Swiss Code of Obligations in 1926.

[16] Considered in relation to the Giupec Report, of December 1992, on proposals in the E.C. for liability in the construction industry, under Harmonisation.

French law is distinguished in its concern for the protection of the owner. He is presumed, it seems, to be ignorant of construction matters, whilst contractors and the professionals are presumed to have knowledge of the defects in the works they have constructed. After completion all those involved in the construction work in contract with the employer are treated by status with regard to their responsibility to the owner for substantial building defects that may appear in the works over the ten-year period.

The scheme for liability in the original text of the Code was the provision within the Obligations of the Sellers[17] as to the guarantee against defects in articles sold in Articles 1641 to 1649; a specific liability by Article 1792 on the architect and contractor for a period of ten years if a building constructed for a lump sum, *à prix forfait* , failed whether in whole or in part due to a defect in construction even though there was a defect in the sub-soil;[18] and a discharge by limitation from liability in respect of substantial works, *gros ouvrages*, by Article 2270.

2 The French legislation of 1967

Amendment was introduced in 1967[19] to extend and adapt the liability in respect of the sale of property to be constructed,[20] *vente d'un immeuble à construire* , and notably as to the liability of architects, contractors and other persons connected with the construction under Article 1792, and then again that year,[21] to clarify the provisions with regard to the class of persons responsible for defects and counteract judicial interpretation. The provisions affecting liability of the seller of property to be constructed became Articles

[17] Book 3, Title VI - Sales. Article 1603 : *"Il a deux obligations principales, celle de délivrer et celle de garantir la chose qu'il vend."* [The seller has two principal obligations, that of delivering and that of guaranteeing the thing sold].

[18] Article 1792, original text: *"Si l'edifice construit à prix fait, périt en tout ou en partie par le vice de la construction, même par le vice du sol, les architectse, et entrepreneurs en sont responsables pendant dix ans."* [If a building is destroyed in whole or in part because of a defect in construction, including a defect in the ground, architects, contractors and other persons bound to the employer by a contract of works are liable for them for ten years.]

[19] Loi no. 67-3, 3rd January 1967.

[20] This applies equally to renovated property: Civ. 3, 2nd May 1978, J.C.P. ed. N. 1979. II. 13, note Meysson.

[21] Loi no. 67-547, 7th July 1967.

1642-1, and 1646-1.[22]

The obligation under the Code of guarantee owed by the seller was by Article 1625[23] given two objectives: first of peaceful possesession, and second, to cover hidden defects, *vices cachés*, or defects of a serious character.[24] The guarantee against hidden defects, applicable to all sales, by Article 1641[25] comprehends those rendering the item sold unsuitable for its intended use or which so diminish such use that the purchaser, had he known of the defect, would either not have purchased or would only have given a lesser price. By Article 1642[26] there was no liability for patent defects, *vices apparents*, or those which the purchaser could discover for himself. The effect of introducing Article 1642-1[27] was to prevent any discharge for patent defects whether before *réception* of the works or before one month after the purchaser took possession, and to provide that an agreement by the vendor to repair the defects prevents rescission, *résolution*, or reduction in price.[28]

The nature of claims under the seller's guarantee in respect of defects that might give rise to *résolution*, was recognised by the imposition by Article

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[22] The Loi also introduced other rules affecting the sale of property to be constructed, Articles 1601-1 to 1601-4.

[23] Article 1625: *"La garantie que le vendeur doit à l'acquéreur, a deux objets: le premier est la possession paisable de la chose vendue; le second, les défauts cachés de cette chose ou les vices rédhibitoires."* [The guarantee owed by the seller to the purchaser has two objectives: the first is peaceful possession; and the second, in respect of hidden defects or defects of an annulling character.]

[24] Those that would enable *résolution* to be achieved. Considered under Termination. In Germany cancellation of the contract requires a serious defect and the remedy of is barred "if the defect diminishes only insignificantly the value or fitness of the work", BGB ¶¶ 634-3.

[25] Article 1641: *"Le vendeur est tenu de la garantie à raison des défauts cachés de la chose vendue qui la rendent impropre à l'usage auquel on la destine, ou qui diminuent tellememt cet usage, que l'aceteur ne l'aurait pas acquise, ou n;en aurait donné qu'en moindre prix, s'il les avait connus."* [The seller is liable on the guarantee for hidden defects in the thing sold which render it unfit for the use for which it was intended, or which so diminish such use that the purchaser would either not have purchased it or would only have paid a lesser price had he known of that defect.]

[26] Article 1642: *"Le vendeur n'est pas tenu des vices apparents et dont l'acheteur a pu se convaincre lui-même."* [The vendor is not responsible for defects which are either patent or in or respect of which the purchaser can satisfy himself.]

[27] Article 1642-1: *"Le vendeur d'un immeuble à construire ne peut être déchargé, ni avant la réception des travaux, ni avant l'expiration d'un délai d'un mois après la prise de possession par l'acquéreur, des vices de construction alors apparent. Il n'y aura pas lieu à résolution du contrat ou à diminution du prix si le vendeur s'oblige a réparer le vice."* [The vendor of property to be constructed is not released from liability in respect of defects in construction that are then apparent whether before acceptance (la réception) of the works or before the expiration of a period of one month after occupation. Termination (résolution) of the contract or diminution in the price will not be required if the vendor undertakes to remedy the defect.]

[28] In Germany in consequence of restriction on cancellation by reference to the nature of the defect the remedy of reduction in price became more important and used with flexibility even to the extent of courts permitting the reduction in price to nil where the entire work proved worthless, BGH, 29th October 1967, BGHZ 42, 232.

1648 of a limitation period[29] by which action must be brought within a short period, *un bref delai*, unspecified in time and to be derived from the nature and manifestation of the defects and the norms of the trade or locality.[30] The determination of the period is for the *juge du fond*, taking into account the facts and circumstances.[31] Providing a measure of uniformity for actions under Article 1641-1, a period of one year from the time when the vendor's liability for patent defects expired was imposed by amendment to Article 1648.[32]

The extent and nature of the liability of the vendor of property to be constructed was then by Article 1646-1[33] linked to that of architects, contractors and others connected with the employer by a *contrat de louage d'ouvrage* by making the vendor liable for ten years from *réception* for hidden defects for which such persons are liable on the application of Articles 1792 and 2270. Further. a guarantee of minor works, *menus ouvrage*, was imposed for two years from *réception*; the guarantees benefit successive owners of the building; and the ability of the vendor to avoid *résolution* or a reduction in price by his agreement to repair the defects was provided. It

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[29] Article 1648: *"L'action résultant des vices rédhibitoires doit être intentée par l'acquéreur, dans un bref délai. suivant la nature des vices rédhibitoires, et l'usage du lieu oú la vente a été faite."* [An action resulting from defects of an annulling character must be brought by the purchaser within a short period, according to the nature of the defects and custom applicable to the sale.]

[30] X. de Mello gives an average of 2 months; An International Comparison of Limitation Periods in relation to Construction Projects, I.B.A. papers presented at the 21st Biennial Conference, New York, 1986.

[31] Civ. 1, 10th January 1968,D. 1968 282. The German BGB provides short periods of limitation, six months in respect of work on goods unless there had been fraudulent concealment; one year in the case of work on land and five years in the case of work on buildings, with the period beginning to run from acceptance, *abnahme*, of the work; BGB ¶¶ 638.

[32] Article 1648, addition by Loi no. 67-547 of 7th July 1967: *"Dans le cas prévu par l'article 1642-1, l'action doit être introduite, à peine de foreclusion, dans l'année qui suit la date `a laquelle le vendeur peut être déchargé des vices apparents."* [In respect of Article 1641-1, the action must be brought, to avoid it being barred, within one year of the date when the vendor's liability for patent defects is discharged.]

[33] Article 1646-1 introduced by Loi no. 67-3 of 3rd January 1967 and Loi no. 67-547 of 7th July 1967 and subsequently replaced: *"Le vendeur d'un immeuble à construire est tenu, pendant dix ans à compter de la réception des travaux, des vices cachés dont les architectes, entrepreneurs et autres personnes liées au maître de l'ouvrage par un contrat de louage d'ouvrage sont eux-mêmes tenus en application des articles 1792 et 2270 du présent code. Le vendeur est tenu de garantir les menus ouvrages pendant deux ans à compter de la réception des travaux. Les garantie bénéficient aux propriétaires successifs de l'immeuble. Il n'y aura pas lieu à résolution du contrat ou à diminution du prix si le vendeur s'oblige à réparer le vice."*
[The vendor of property to be constructed is liable for a period of 10 years following the acceptance of the works for those hidden defects for which architects, contractors and other persons connected with the employer in respect of works are themselves liable by the application of articles 1792 and 2270 of the current code. The vendor is liable by warranty for minor works for 2 years following the acceptance of the works. These warranties are for the benefit of all successors in title to the property. Termination (résolution) of the contract or diminution in the price will not be required if the vendor undertakes to remedy the defect.]

seems that substantial argument had been advanced that Article 1792 was to be regarded as a special law derogating from a principle of non-liability after *réception* , particularly in the case of work on goods, although the *Cour de Cassation* had held in 1958 that for *menus ouvrages* contractors remained liable for hidden defects notwithstanding prior acceptance of the work by the employer.[34]

The 1967 amendment counteracted the effect of the refusal by the *Cour de Cassation* to apply the presumption of liability under Article 1792 to an architect on the ground that such profession did not conclude applicable contracts.[35] It deleted the restriction to contracts, *prix fait* , and extended the range of those responsible to all persons linked to the employer beyond architects and contractors.[36] The original text of article 1792 provided: "If a building is destroyed in whole or in part because of a defect in construction, including a defect in the ground, architects, contractors and other persons bound to the employer by a contract for the hire of worl and skill are liable for them for ten years."[37] The original Article 2270 constituted a discharge of the architect and contractor from the guarantee after ten years in respect of *gros ouvrages* constructed or directed by them, with no legislative limitation for hidden defects in *menus ouvrages* but subject to action within a *bref délai.* Article 2270 as introduced in 1967[38] added a two year period for the liability of those involved in respect of such ordinary or *menus ouvrages* .

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[34] Cass. Civ. 4th January 1958 and Cass. Civ. 19th May, 1958, JCP, 1958 II 108.

[35] In Belgium there was not the same change in 1967 and the wording of Articles 1792 and 2270 remains.

[36] In Italy there was development beyond the pattern of the French codification, but the Italian *Codice Civile* Article 1669, whose origin was the French Article 1792, was not subject to the lump sum provision, *prix fait.* The liability operatd in favour of the employer's successors in title and appears regarded as an extra-contractual liability deriving from the *ordine publico.* As a result, claimants needed to prove no direct contractual relationship with the person liable and in consequence their position was not be weakened by disclaimers or limitations of liability.

[37] Article 1792, original text; *"Si l'edifice construit a prix fait, périt en tout ou en partie par le vice de la construction, même par le vice du sol, les architectes, et entrepreneurs en sont responsables pendant dix ans."*

[38] Article 2270 as introduced by Loi no.67-3, 3rd January 1967: *"Les architectes, entrepreneurs et autre personnes liées au maître de l'ouvrage par un contrat de louage d'ouvrage ont déchargés de la garantie des ouvrages qu'ils ont faits ou dirigés après dix ans s'il s'agit de gros ouvrages, aprés deux ans pour les menus ouvrages."* [Architects, contractors and others connected with the employer in respect of a contract for the hire of work and skill are discharged from their guarantee of the works they have carried out or supervised after ten years for substantial works , and after two years for minor works.]

3 The *Loi Spinetta*[39]

The 1978 legislation has been described as revolutionary, in the sense of breaking with the traditional rules based on the Code Civil, but it is an organised and practical approach retaining as its base the ten year period for liability, and increasing the significance of *réception*. In conjunction with the legislation substantial measures were introduced into the *Code de la Construction et de L'Habitation*,[40] particularly the innovative regime of compulsory insurance of the liabilities to which Articles 1792 and following give rise.[41] Article 1792 as introduced in 1978 provides:

> "Every person who takes on construction work (*tout constucteur*) is liable in law to the employer or the purchaser of the resulting work in respect of any damage, including the effects of any deficiency in the ground, which jeopardises the soundness of the work or, by affecting constituent parts, components or equipment, renders it unfit for its purpose.
> Such liability may only be avoided if the person taking on the work proves that the damage was caused by *cause étrangère*."[42]

Article 1792-1[43] identifies *tout constructeur* under Article 1792 as including three groups. First, every architect, contractor, technician or other person connected[44] with the employer by a *contrat de louage d'ouvrage* in respect of works, from the 1967 amendment. Second, every person who sells, after completion, works that he has constructed or caused to be constructed. The vendor of a completely finished building would not have been subject to the same liability as under a *contrat de louage d'ouvrage*, but only for hidden defects. By this addition to the ranks of *tout constructeur* such vendor carries the same liability. This also applies to the vendor of a building yet to

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[39] Loi no. 78-12 of 4th January, 1978 with effect from 1st January 1979, named after the engineer M. Spinetta who was the force behind the legislation.

[40] Decree no. 78-621 of 31st May 1978.

[41] Code de la Construction et de L'Habitation, Section VIII Assurance des travaux de bâtiment, Articles L. 111-27 to L.111-39, and paricularly at L. 111-28.

[42] Article 1792: *"Tout constructeur d'un ouvrage est responsable de plein droit, envers le maître ou l'acquéreur de d'ouvrage, des domages, même résultant d'un vice du sol, qui compromettant la solidité de l'ouvrage ou qui, l'affectant dans l'un de ses éléments constitutifs ou l'un de ses éléments d'équipement, le rendent impropre 'a sa destination. Une telle resposabilité n'a point lieu si le constructeur prouve que les dommages provennent d'une cause étrangère."*

[43] "1. Every architect, contractor, technician or other person connected with the employer by a *contrat de louage d'ouvrage* in respect of works. 2. Every person who sells, after completion, works that he has constructed or caused to be constructed. 3. Every person who, while acting in the capacity of "mandataire" carries out a function similar to that of an owner. employer."

[44] This includes any *contrôler technique* or *bureaux de contrôle*.

be constructed by virtue of amendment to incorporate the width of Articles 1792, 1792-1, 1792-2 , and 1792-3 into Article 1646-1.[45] The Code extends the liabilities of the *constructeur* to the first vendor of the building to be built, and to the vendor of a building built for himself.

The third inclusion is everyone who while acting in the capacity of *mandataire* implements a function similar to an owner/employer, *locateur d'ouvrage* . The *contrat de louage d'ouvrage* is distinct from an agency, and the *constructeur* under such engagement, including any architect, is not by that an agent of the *maître d'ouvrage* , although an employer may give power to an architect to act as agent. The project manager is seen as an agent of the *maître d'ouvrage* , and whilst in principle the agent would have no liability for defects this amendment assimilates him as described into the role and responsibility of *constructeur*.

Article 1792-2[46] referring to the *présomption de responsabilité* imposed by Article 1792 extends the responsibility to damage affecting the reliability of the component parts or equipment fitted into a building, but only when they form an integral part of the services, foundations or framework of it, whether by enclosure or cladding. The equipment element is taken as an integral part when its removal, dismantling or replacement cannot be carried out without deterioration to or loss of function of the structure. Other items of equipment in the building are, by Article 1792-3,[47] subject to a guarantee of proper performance, *garantie de bon fonctionnement* but with

[45] Article 1646-1 as introduced by Law no. 78-12 of 4th January 1978 with effect from 1st January 1979: *"Le vendeur d'un immeuble à construire est tenu, à compter de la réception des travaux, des obligations dont les architectes, entrepreneurs et autres personnes liées au maître de l'ouvrage par un contrat de louage d'ouvrage sont eux-mêmes tenus en application des articles 1792, 1792-1, 1792-2 et 1792-3 du présent code. Les garanties bénéficient aux propriétaires successifs de l'immeuble.Il n'y aura pas lieu à résolution de la vente ou à diminution du prix si le vendeur s'oblige à réparer les dommages d'éfinis aux articles 1792, 1792-1 et 1792-2 du présent code et à assumer la garantie prévue à l'article 1792-3."*
[The vendor of property in the course of construction is liable, with effect from the acceptance of the works, in respect of those obligations for which architects, contractors and others in contract with an employer in respect of works are themselves liable under articles 1792, 1792-1, 1792-2 and 1792-3 of the current code. Neither *résolution* of the sale nor a diminution in price can take the place of this obligation if the vendor agrees to repair the damage referred to in articles 1792, 1792-1 and 1792-2 of the current code and adopts the guarantee provided for in article 1792-3.]

[46] Article 1792-2: *"La présomption de résponsabilité établie par l'article 1792 s'etend également aux dommages qui affectant la solidité des éléments d'équipement d'un bâtiment, mais seulement lorsque ceux-ci font indissociablement corps avec les ouvrages de viabilité, de fondation, d'ossature, de clos ou couvert. Un élément d'équipement est considéré comme formant indissociablement corps avec l'un des ouvrages mentionnés à l'alinéa précédent lorsque sa dépose ou enlèvement de matière de cet ouvrage."*

[47] Article 1792-3: *"Les autres éléments d'équipement du bâtiment font l'objet d'une garantie de bon fonctionnement d'une durée minimale de deux ans à compter de la réception de l'ouvrage".*

a limitation period of two years from *réception* .

The manufacturer of components in the building, or parts, or an item of equipment purpose-built for the works is, by Article 1792-4,[48] jointly liable under Articles 1792, 1792 2 and 1792-3 where the component is incorporated unmodified and in accordance with the manufacturer's instructions. Where the item is imported, the importer bears the responsibility of the manufacturer.

The vital distinction between mandatory, *droit impéritif* or *d'ordre public*, and non-mandatory, *droit supplétif* , rules in the Code was not left to subsequent decision for Article 1792-5 stipulates that any attempt to exclude or limit the responsibilies imposed by Articles 1792, 1792-1 and 1792-2 or to exclude the guarantee under Article 1792-3 or to limit the range of Article 1792-4 is void and of no effect.

Whilst Articles 1792 and 2270 are rules of the *ordre public* and cannot be the subject of total disclaimer, limitations on the extent of recovery or limitation of liability may impinge where both parties are building professionals. Nevertheless where such person knew of a defect or was grossly negligent in not knowing of it then he would be prohibited from relying on an exclusion or limitation clause, following from Article 1134 al. 3,[49] requiring that agreements be executed in good faith. The distinction in contractual relations between commercial men and domestic consumers as to the validity of exclusions or limitations of liability was recognised by Article 1646-1, and with regard to the, building developer, *promoteur immobilier* , by Article 1831-1 to -5.

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[48] Article 1792-4: *"Le fabricant d'un ouvrage, d'une partie d'ouvrage ou d'un élément d'équipement conçu et produit pour satisfaire, en état de service, à des exigences précises et déterminées à l'avance, est solidairement responsable des obligations mises par les articles 1792, 1792-2 et 1792-3 à la charge du locateur d'ouvrage qui a mis en œuvre, sans modification et conformément aux règles édictées par le fabricant, l'ouvrage, la partie d'ouvrage ou élément d'équipement considéré. Sont assimilés à des fabricants pour l'application du présent article: Celui qui a importe un ouvrage, une parite d'ouvrage ou un élément d'équipement fabrique à l'étranger; Celui qui l'a présente comme son œuvre en faisant figure sur lui son nom, sa marque de fabrique ou tout autre signe distinctif."*

[49] Article 1134 *"Les conventions legalement formees tiennent lieu de loi a ceux qui les ont faitee. Elles re peuvent etre revoquees que de leur consentement neutral, ou pour les causes que la loi autorise. Elles doivent etre executees de bonne foi."* ["Agreements when legally made are binding under law between those between whom they are made. They may only be rescinded by mutual consent or on grounds provided by law. They must be executed in good faith."]

The regime provides for defects arising after completion, but an obligation to complete works carries with it the obligation to complete them properly on their face without apparent defects and is that of achieving completion. Practical realities of building weighed against reluctance to impose acceptance on an owner utilising uncompleted or defective works constructed on his land, and led to a balancing of interests. Completion is achieved by acceptance of the works, but the obligation and right of contractors to remedy defects continues, as opposed to the obligation to pay damages. Article 1792-6 approaches this by reference to *réception* and the imposition of a one year defects liability period, *garantie de parfait achèvement*.[50]

For the duration of the warranty under Article 1792, Article 2270 provides that every person, natural or legal, who may be liable by virtue of Articles 1792-4 is released from the liability and guarantees imposed by the application of Articles 1792 to 1792-2 ten years after acceptance of the works or, by the application of Article 1792-3, on the expiration of the period prescribed by that Article, namely two years.

4 England

Implication of terms

The primary obligation is to perform the contract in accordance with its terms. A useful expression is in *Alderslade v Hendon Laundry Ltd.*:[51]

> "... what I may call the hard core of the contract, the real thing to which the contract is directed, is the obligation of the Defendants to launder. That is the primary obligation. It is the contractual obligation which must be performed according to its terms, and no question of taking due care enters into it. The Defendants undertake, not to exercise due care in laundering the customers' goods, but to launder them, and if they fail to launder them it is no use their saying, "we did our best, we exercised due care and took reasonable precautions, and we are very sorry if as a result the linen is not properly laundered." That is the essence of the contract ...".

Implied terms may be required and the obligation on contractors to perform

[50] Considered under Completion and Acceptance of Work, *La Réception.*

[51] Alderslade v Hendon Laundry Ltd. (1945) 1K.B. 189 (C.A.) per Lord Greene M.R.; a case on the ability to rely on the terms of a clause limiting liability.

work with all proper skill and care, expressed as in a good and workmanlike manner, is a usual term implied where no express terms make similar or other provision. The degree of skill will involve a court in considering the circumstances of the contract and such degree of skill as expressly was or impliedly ought to be within the professed function of the contractor. Where materials are involved the usual implied term is that they shall be of good quality. The third usual implied term is one of fitness for purpose of the work as completed, but this involves the employer making known to the contractor the particular purpose for which the work is to be done and the circumstances showing that the employer relied on the contractor's skill and judgment in the matter.[52]

In respect of the first of the usual implied terms, the degree of skill implied derives from the *lex artis* and it was same guiding civil law maxim to which recourse was made in the case of *Harmer v Cornelius*[53] where the nature of the obligation incumbent on a skilled labourer, artisan or artist was identified as the implied warranty that such persons "possess and exercise reasonable skill in their several arts". The profession of an art amounted to a representation "to all the world that the professor possesses the requisite ability and skill". In this sense considerations of negligence enter into the question of breach of contract.

The effect of the implied term as to quality renders the contractor liable for latent defects even though the employer may have chosen the materials and even though there may have been no lack of care or skill on the part of the contractor, *Young &Marten Ltd. v McManus Childs Ltd.*.[54] Certainly, the express terms and surrounding circumstances of the contract are paramount as to whether and the extent to which terms are to be implied, but, once implied that the completed work is to be fit for its purpose, unanticipated difficulty, or even impossibility in achieving the result desired, will not avail the contractor in escaping from liability.[55]

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[52] Such reliance need not be total or exclusive, as where certain matters are specified in great detail and others left to the skill of a contractor, Cammell Laird & Co. v The Manganese Bronze and Brass Company (1934) AC 402.

[53] Harmer v Cornelius (1858) 5 CB (NS) 236, adopting the maxim: "spondet peritiam artis - Imperitia culpae adnumeratur".

[54] Young and Marten Limited v McManus Childs Limited (1969) 1 AC 454.

[55] Thorn v London Corporation (1876) 1 App. Cas. 120.

The facility with which discussion of implied terms in English building contracts takes place must be tempered by reference to the necessity for implication. Where comprehensive general conditions are incorporated as terms of the contract together with specifications and bills of quantities with detailed preliminaries, there is very little scope for implication.[56] In the case of sales of uncompleted houses the implication of the three usual terms as to workmanship, materials and fitness for habitation has become tantamount to a rule of law where such terms are not expressly excluded. The practice, dependent upon economic circumstances, of leaving dwellings without the completion of final matters such as decorations or sanitary or kitchen fittings so as to permit a choice by the purchaser does not mean that the implications of the terms is restricted only to those matters uncompleted at the time of contract but they extend to the whole construction already carried out.[57]

In terms of remedies for defective work, subject always to express terms the medium of damages will impinge on the ability of the contractor to recover payment, when the question whether entire performance is a condition precedent becomes material with the application of the principle of substantial completion.[58]

The basis of liability for defects in English law so far as implied terms extend is not dependent upon fault but on an objectively viewed standard derived from the deemed possession of the requisite ability and skill on the part of the contractor. On the continent, however, the duty to warn becomes important and reflects the support for the strict liability of the contractor, particularly where the employer is not a building professional.

A Duty to Warn

This aspect highlights the different development of civil law and English law. From Roman law the nature of a contractor's task was seen as an

[56] Nevertheless the law will imply such usual terms as have been referred to above unless the parties have indicated an intention to exclude or modify them Liverpool City Council v Irwin (1977) AC 239.

[57] Perry v Sharon Development Co. Ltd (1937) 4 All E.R. 390; Hancock v Brazier (Anerley) Limited (1966) 2 All E.R. 901.

[58] Considered under Réception and Payment.

obligation to achieve the result, and this was carried into civil law to produce a liability of the contractor for non-achievement of the end. English legal analysis of the promise and degree of reliance upon the contractor may achieve the same result through the mechanism of a term of fitness for purpose, even where compliance with terms as to workmanship and materials is achieved. Essentially the difference in approach derives from the status of the contract or obligation to build afforded by the civil law and the view of the particular contractual obligation in English law.

Whilst undoubtedly changes in the works necessitated by defective plans or specifications may be made upon the intervention or advice of the contractor, the question arises whether and to what extent a contractor owes a duty under English law to examine the plans and specifications that he receives for omissions or defects and to warn the employer if he concludes that performance by him in accordance with those plans and specification will result in an unsatisfactory job.

Stated in this way, the question is whether there is an overriding duty to say that what is required by contract to be performed will or may not achieve what is or might or should be perceived as the end result of the bargain. Assuming a contract to build to a certain specification or plan the answer to the question would have to lie in the contract by express or implied terms, and such a duty might conflict with that central contract obligation. Equally the scope for a duty at common law in tort would be limited or negated in this way. The crucial aspect is the extent to which the contractor is relied on for his skill and judgment, and the nature of that reliance.

English courts have considered the question in various contexts. *Duncan v Blundell*[59] concerned an instruction to install a stove, which the defendant implemented, unsuccessfully, by laying a tube under the floor to vent the smoke. The principle applied was:

> "Where a person is employed in a work of skill, the employer buys both his labour and his judgment; he ought not to undertake the work if he cannot succeed, and he should know whether it will or not; of course it is otherwise if the party employing him should supersede the workman's judgment by using his own."

[59] Duncan v Blundell (1820) 3 Stark. 6.

Although authority that in circumstances of a contract for labour and materials a contractor may have obligations covering design and the ultimate achievement of the employer's scheme in terms of fitness for purpose, the qualification to the general statement of principle operates when translating such obligation into the context of substantial building contracts.

In *Lynch v Thorne*[60] the contractor complied exactly with the drawings and specifications forming part of the contract, and was not liable for an obvious defect in the house. The central argument was on an implication of a warranty that the house would be fit for habitation, for the purposes of which it was admitted that the employer relied on the contractor. Both the implication and a duty to warn were rejected:

> "... there was an express contract as to the way in which the house was to be completed. The express provisions were exactly complied with, and any variation from them which would have rendered this wall waterproof would have been a deviation from the express language of the contract."

The result was criticised substantially on the point of implication, not directly on the refusal to impose a duty to warn, but the result was to negate a liability on contractor who had performed precisely his contractual obligation where that result was defective otherwise than through breach of his obligation.

The distinction between the implication of the term and the imposition of such a duty, contractual or otherwise, is not semantic. Compliance with an implied term of suitability necessarily involves contractors examining the drawings and specifications. An obligation to provide a building that is fit for habitation or suitable may well override bare compliance with plans depending on the skill and judgment required to be exercised to achieve the object. Where such an obligation is imposed, the liability for any errors that may generically be design effectively becomes joint and several in the absence of any contrary provision between the designer and builder. Under such responsibility, contractors would be bound to warn employers of any defects or omissions in the drawings and specifications for them to be remedied and for them to escape liability. This would mirror an obligation under a duty to

[60] Lynch v Thorne (1956) 1 W.L.R. 303 (C.A.), per Lord Evershed, M.R.; the facts concerned a wall which, though constructed in accordance with the plan, could not keep out driving rain.

warn.

Within the last decade first instance decisions in *EDAC v Moss* [61] and *Manchester University v Wilson & Womersley* [62] involved finding a duty to warn the employer through his agent the architect. In *EDAC*,[63] the conclusion was to imply a term into the main contract to give business efficacy and to implement the intentions of the parties that the contractor should warn the employer of any design defects that became known during the work.[64] In the *Manchester University* case the judge followed his decision in *EDAC* and found an implied term for the contractors to warn of defects "which they believed to exist" which was circumscribed and "did not ... require them to make a critical survey of the drawings, bills and specifications, looking meticulously for mistakes ... the ... obligation to warn arose when, in the light of their general knowledge and practical experience, they came to believe than an aspect of the design was wrong."[65] This stops short of a policing exercise, beyond the traditional division of function between architect and contractor. The justification for the duty in *EDAC* was that if a contractor knew of design defects it would be absurd not to inform

[61] Equitable Debenture Assets Corporation Limited v William Moss (1984) 2 Construction Law Reports 1; a case involving defective curtain walling, where the defects were as a result of both poor design by the specialist curtain-walling sub-contractor and the bad workmanship of the main contractor.

[62] Victoria University of Manchester v. Wilson and Womersley and Pochin (Contractors) Limited (1984) 2 Construction Law Reports 43.

[63] The reasoning was " ... if on examining the drawings or as a result of experience on site Moss formed the opinion that in some respect the design would not work, or would not work satisfactorily, it would have been absurd for them to have carried on implementing it just the same. ... if the directors of EDAC and of Moss had been asked at the time when the contract was made what Moss should do in those circumstances, they would have agreed at once that Moss should communicate their opinion to Morgan. ... therefore, ... in order to give efficacy to the contract, the term requiring Moss to warn of design defects as soon as they came to believe that they existed was to be implied in the contract." The judge also considered that the duty to warn should also be imposed on the main contractor as part of his duty of care in tort. As the content and extent of such a duty was co-existent with that under the contract, the issue did not form a material part of the judgment and was not analysed.

[64] To support the conclusion, reliance was placed on the Canadian case of Brunswick Construction Ltd. v Nowlan (1974) 21 B.L.R. 27, Supreme Court of Canada. Contractors agreed to build a dwelling based on drawings and a specification prepared by an independent architect. As a result of design defects there was leakage but the contractors were held liable on the basis that they, as experienced contractors, should have known of the defects in design and were consequently under a duty to warn the employer of the danger inherent in executing the plans provided. This was a majority decision; per Ritchie, J. "In my opinion a contractor of this experience should have recognised the defects in the plans which were obvious to the architect subsequently employed by the (owner) and knowing of the reliance which was being placed upon it, I think that the (contractor) was under a duty to warn the (owner) of the danger inherent in executing the plans ... ".

[65] Victoria University of Manchester v. Wilson and Womersley and Pochin (Contractors) Limited (1984) 2 Construction Law Reports 43; "Belief that there were defects required more than mere doubt as to the correctness of the design, but less than actual knowledge of errors." The case concerned cladding, although cladding to a relatively new design which had, in due course, fallen away in certain areas. The contractor was again employed on the JCT Standard Form of Contract (1963 edition), and again the employer employed an architect.

the employer, but, equally, a contractor knows that he must abide by his contract and comply with the plans and specifications to avoid being in breach. Such approach could override the promise to perform in accordance with the contract; and to resort to the description of absurdity may be a disguise for a decision to relieve the employer from the consequences of a contract to build to a deficient specification.

This point was revisited in *Glasgow University v Whitfield & Laing Construction* ,[66] after *Muirhead v Industrial Tanks* [67] and *Simaan v Pilkington* .[68] The contractor was a third party, and the claim of a duty to warn was made by the defendant architect.[69] The judgment rejected the duty either in contract or in tort,[70] and, based on *Tai Hing Cotton* [71] and *Lynch v Thorne* [72] it concluded that "... there was no room for the implication in the contract of an implied duty to warn the building owner of defects in the architect's design ...".[73]

An obligation to warn is appropriate in circumstances where the employer expressly or by necessary implication makes known to the contractor reliance on him to exercise the skill and judgment of a contractor,[74] and within that

[66] The University of Glasgow v William Whitfield & John Laing (Construction) Ltd (Third Party). (1988) 42 B.L.R. 66. The University employed Whitfield as architect, and Laing as contractor, on the JCT 1963 Standard Form. The design defect in this case led to leaks of water and condensation.

[67] Muirhead v Industrial Tank Specialities (1986) Q.B. 507 (C.A.).

[68] Simaan General Contracting Company v Pilkington Glass Ltd (1987) 1 W.L.R. 516 (C.A.).

[69] The architects' claim under the Civil Liability (Contribution) Act 1978. The difficulty the architect faced was that under transitional provisions there was no entitlement to recover contribution by reference to any liability based on breach of an obligation assumed before the date when the Act came into force. The contractors' obligations were assumed well before that, and the architects were unable to claim any contribution based on any alleged breach of the contract between contractor and employer.

[70] No duty to warn existed in tort as the duty of care was only where a risk of damage to persons or other property was concerned; in this case any loss suffered was purely economic and irrecoverable in any event. Where a detailed contract existed between the parties, there could be no room for the implication of a duty to warn about possible defects in design.

[71] Tai Hing Cotton Mill v Liu Chong Hing Bank (1986) A.C. 80 (P.C.). The finding on contractual liability was crucial because of the conclusion that there should be no wider duty in tort than there was in contract, following Tai Hing where it was, at p. 107, not accepted " ... that the parties' mutual obligations in tort can be any greater than those to be found expressly or by necessary implication in their contract."

[72] (1956) 1 W.L.R. 303 (C.A.). The passage relied on was "...where there is a written contract expressly setting forth the bargain between the parties, it is, as a general rule, also well established that you only imply terms under the necessity of some compulsion.", at p. 306.

[73] EDAC and Manchester University were distinguished on the ground that there the judge had in mind the situation where the contractor knew that the owner placed reliance on him in the matter of design. (1988) 42 B.L.R. 66. They " ... can stand with more recent decisions if they are read as cases where there was a special relationship between the parties, but not otherwise ...".

[74] When a term as to fitness for purpose would ordinarily be implied, IBA v EMI Electronics Ltd. and BICC Construction Ltd (1980) 14 B.L.R. 1 (H.L.).

standard design defects are apparent.[75] Where such a duty imposes obligations on the contractor,[76] those obligations should be restricted so that if in the course of the performance of his basic duties under the contract to follow the design as received, the contractor discovers by reason of his knowledge and experience that the design is incomplete or patently deficient in any way, he should not carry on and build in accordance with that design without drawing attention to the matter so that it might be remedied by variation.[77]

There is no such term in JCT 80,[78] nor in the ICE Conditions, 5th or 6th Editions, nor in FIDIC. On the contrary the ICE based forms contain an express statement which ordinarily would override implication of a term as to warning. The ICE 5th edition provides in clause 8 (2):

> "The Contractor shall take full responsibility for the adequacy, stability and safety of all site operations and methods of construction, provided that the Contractor shall not be responsible for the design or specification of the Permanent Works (except as may be expressly provided in the Contract) or of any Temporary Works designed by the Engineer."

This would not, however, mean that if, for example, the contractor sees that the engineer's design of a temporary cofferdam is bound to fail, he is obliged to go ahead with the works and has no obligation to warn the client or the engineer as his agent, of the dangers involved.[79]

Even where a concurrent duty in tort exists a claim in tort cannot be used to escape the effect of contract provisions.[80] Although a time barred contract claim does not itself debar an action in tort during the potentially longer

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[75] Lindenberg v Canning (1992) 29 Construction L.R. 70 at 81.

[76] Why this does not arise as a matter of course in building work is because of the role of the architect; the captain of the ship, as it is sometimes descibed.

[77] The point arose in the Abbeystead disaster case, Eckersley v Binnie & Partners (1988) 18 Con. L.R. 1, and the nature of the obligation of the contractor there led to the conclusion per Bingham L.J. at p. 147: "They were simply employed to build the tunnel, and while they were bound to do that in a competent, professional and safe way, they were not bound to do more than that."

[78] Save for giving notice if divergence between statutory requirements andthe contract documents is found.

[79] As postulated in Eckersley v Binnie & Partners by Russell L.J. at p. 68, and in relationship to the workforce.

[80] William Hill Organisation Ltd. v Bernard Sunley Ltd. (1983) 22 B.L.R. 1 (C.A.), where the plaintiff could not rely on a claim in tort to escape the effect of a final certificate.

limitation period, *Pirelli v Oscar Faber*[81] is unlikely to provide guidance for the future, and the approach is like;y to be as applied in *Nitrigin Eirann v Inco Alloys Ltd.*.[82] Under a building contract where the architect designs and the contractor constructs it will not be often that there will be found the necessary degree of reliance by the employer on the contractor in matters of design for liability in tort to arise.

Whilst *Murphy v Brentwood*[83] has restricted recoverability of economic loss, the decision did not affect such recoverability where there is a sufficient relationship of proximity to allow operation of the *Hedley Byrne* principle.[84] If it applies between sub-contractor and employer, then it may equally apply between main contractor and employer, and whilst it may have been thought that *Hedley Byrne* liability was restricted to professionals, there is no good ground for distinguising or excluding contractors,[85] for the requirement is that the person making the representation professes some special knowledge or expertise.

If the contractor's liability to his employer in tort for pure economic loss comes only within the *Hedley Byrne* category, then this may impede a duty to warn, it being a positive requirement of providing advice. Whilst it has been suggested that "professional advice may be too narrow a definition in this context. Negligent professional acts or omissions, if advisory in nature, may be regarded as breaches of duty leading to recoverable pure economic loss ... This could always prove a Trojan Horse for duties to warn and other

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[81] Pirelli General Cable Works Ltd. v Oscar Faber & Partners (1983) 2 A.C. 1, where the existence of a cause of action in tort was assumed on the then state of the law from the fact of damage to the chimney itself. In Lancashire and Cheshire Associaciation of Baptist Churches Inc. v Howard & Seddon Partnership (1993) 3 All E.R. 467, it was held that a duty of care actionable in tort could exist where the parties were in a contractual professional relationship, to provide a right of action where the claim for breach of contract was statute barred.

[82] Nitrigin Eirann v Inco Alloys Ltd. (1992) 1 W.L.R 498, where Pirelli was distinguished and a defect in quality not causing physical damage was found not to have started time running.

[83] Murphy v Brentwood District Counci (1990) 1 A.C. 398. This is considered further under Fault, Tort and Economic loss.

[84] Hedley Byrne & Co. Ltd. v Heller & Partners (1964) A.C. 465. In Murphy it was affirmed that the relationship between a sub-contractor and his employer could still give rise to a Hedley Byrne liability, (1990) 1A.C. 398; per Lord Keith: "It would seem that in a case such as Pirelli, where the tortious liability arose out of a contractual relationship with professional people, the duty extended to take reasonable care not to cause economic loss to the client by the advice given ... I regard Junior Books ... as being an application of that principle."

[85] Morgan Crucible Co. v Hill Samuel Bank (1991) 1 All E.R. 148.

generic liabilities ..."[86] It may be a Trojan Horse for holding that a contractor is in breach of a professional duty if he fails to warn of a defect in a design, but if physical loss resulted from a defect in design of which the contractor failed to warn, then where there is reliance the contractor will still be liable in tort to the employer, not under *Hedley Byrne*, but under a *Donoghue v Stephenson*[87] duty including one to take reasonable care to avoid omissions, as well as acts, which can reasonably be foreseen as likely to injure.[88]

The ability of an employer to show reliance will depend on the extent to which he engages professionals and the decision in *Pacific Associates Inc. v Baxter*[89] confirms the long held view that " the engineer has no duty to the contractor as such to detect or prevent faults in temporary works (or the permanent works). The engineer is appointed to protect the employer, not the contractor."[90] However, the position of the employer is markedly clearer in civil law jurisdictions. In France the *Cour de Cassation* has consistently held that a contractor who fails to caution against risks involved in the execution of the plans may incur liability for damages, although an exception is made in respect of the employer who himself is competent in construction work.[91]

Contractors are perceived as having responsibilities to the owner that overlap those of the *maitre d'oeuvre* , and there is not a demarcation as

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[86] From Professor P. Capper's paper at the 3rd Annual Construction Conference, Kings College, London, September 1990, Legal Obligations in Construction. Professor P. Capper's point was by reference to Ross v Caunters (1980) 1 Ch. 297, which has been approved in White v Jones (1993) 3 All E.R. 481.

[87] Donoghue v Stephenson (1934) A.C. 562.

[88] In Lancashire and Cheshire Associaciation of Baptist Churches Inc. v Howard & Seddon Partnership (1993) 3 All E.R. 467, the submission of designs was found not to be for the purpose of a statement as to their technical qualities, and as the loss was purely economic no duty to prevent such existed.

[89] Pacific Associates Inc. v Baxter (1990) 1 Q.B. 993; "The argument often put forward in practice that it is somehow an excuse for faults in workmanship or materials that they were not objected to by the engineer or resident, is to imply that the employer is in a worse position if he engages engineers to supervise the contractor than if he does not."

[90] M.W. Abrahamson, Engineering Law and the ICE Contracts, from the 4th Edition, 1979, at p. 53.

[91] Cass. civ. 13th May 1971; Bull. civ. 1971 III 212 No. 297.

referred to in *Clayton v Woodman*.[92] The contractor's function is not seen as an instrument for carrying out the orders and following the design decisions of the architect, rather his is a professional function to make himself aware of potential problems including basic errors in design and construction and call attention to them. This is seen in AFNOR 91 by the provision which formally requires the contractor both before the works begin and during construction to bring to the attention of the *maitre d'oeuvre* any defects or problems resulting from errors or omissions that he finds in documents or in orders he receives.[93] The consequence of the obligation of this nature is a sharing of responsibility for the successful outcome of the work and for problems of design as well as construction.

The function of the contractor is in France also taken as an incident of his status and with this status comes the duty to advise the employer. This is provided for by Article 1135 of the Code Civil which creates an affirmative duty to advise and provide information about the difficulties or risks that may be encountered in the execution of the works,[94] even to the extent of matters falling outside the confines of the contract, for instance risks to neighbouring land, potential disadvantages of the construction processes being used, or difficulties with soil conditions.

Nevertheless, it would be wrong to conclude that English law is deficient in terms of obligations imposed on a contractor compared with civil law jurisdictions. Obligations imposed on the contractor in English law show that the ultimate responsibility for matters of design may fall on the contractor in ways unconnected with a duty to warn in the sense that the question posed at the outset suggests.

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[92] Clayton v. Woodman & Son (Builders) Ltd. (1962) 1 W.L.R. 585; Pearson, L.J. at 593: "It is important that the responsibility of the builder should not be overlaid or confused by any doubt as to where his province begins or some other person's province ends in that respect. The architect, on the other hand, is engaged as the agent of the owner for whom the building is being erected, and his function is to make sure that in the end, when the work has been completed, the owner will have a building properly constructed in accordance with the contract, plans, specifications and drawings, and any supplementary instructions which the architect may have given ... It is the function and right of the builder to carry out his own building operations as he thinks fit ... ".

[93] AFNOR 91, Article 5.4.

[94] Article 1135: *"Les conventions obligent non seulement à ce qui y est exprimé, mais encore à toutes les suites que équité, l'usage ou la loi donnet à l'obligation d'aprés sa nature."* [Agreements are binding not only as to what is expressed, but also as to the consequences which *equité*, usage or law imposes on the obligation, according to its nature.]

The existence of an obligation to build fit for the purpose will necessarily involve the contractor in the detailed examination of the design which he is obliged to follow. Likewise, the obligations to build in a workmanlike manner and use proper materials might well be breached in the event of the building ultimately being unfit, albeit by reason of matters which may in one sense be problems of design.[95] Further, if the contractor takes on an obligation to achieve a particular purpose or function, he will not be relieved of the duty to achieve that particular purpose or function by the deficiency of designs which he is also under a contractual duty to follow.[96] In the context of the purpose of a building contract, an express obligation to achieve the end may override, and failure will result in liability notwithstanding that the secondary obligation has been complied with,[97] so where the contractor is under such an obligation he becomes involved in similar activities in relation to the examination of design documents as he would be obliged to carry out in pursuance of a duty to warn under the law as it appears in civil law jurisdictions.

This proposition as to English law must be found in a warranty that the work will be fit for its purpose. A warranty may be implied from facts showing that the employer made known the particular purpose to the contractor or that the work was of a kind which the contractor held himself out as skilled in performing; and that the employer relied on the contractor's skill and judgment.[98] To meet such warranty the contractor may well have to do more physically than the contract on its face expressly requires of him. Whilst an obligation to conform with detailed plans and specifications not of his own responsibility will reduce the scope for the operation of such an implied warranty it may apply to parts of the work,[99] or further, the duty to comply

[95] D. Cornes, Design Liability in the Construction Industry, 4th ed., 1994.

[96] This view is supported in Hudson's Building and Engineering Contracts, 10th Edition p.291: "So a contractor will sometimes expressly undertake to carry out work which will perform a certain duty or function, in conformity with plans and specifications, and it turns out that the works constructed in accordance with the plans and specifications will not perform that duty or function. It would appear that generally the express obligation to construct a work capable of carrying out the duty in question overrides the obligation to comply with the plans and specifications, and the contractor will be liable for the failure of the work notwithstanding that it is carried out in accordance with the plans and specifications."

[97] Hence, the use of the performance specification.

[98] Cammell-Laird & Co Ltd. v Manganese Bronze & Brass Co. Ltd. (1934) A.C. 402 (H.L.); partial reliance suffices.

[99] Greaves & Co. Ltd. v Baynham Meikle (1975) 1 W.L.R. 1098; where engineers engaged by a contractor to design a floor to enable the contractors to fulfil their contract were in the facts taken to have impliedly warranted the suitability of their design for the particular purpose.

with detailed plans or specifications may be subsumed in an express warranty.[100]

Defective Premises Act

Of underrated significance is the Defective Premises Act 1972,[101] which has an important bearing, although its ambit is dwellings.[102] A duty is created:

> " ... to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed."[103]

It is owed by "A person taking on work for or in connection with the provision of a dwelling" whether by erection, conversion or enlargement and the manner of compliance with that duty is defined:

> "A person who takes on any such work for another on terms that he is to do it in accordance with those instructions given by or on behalf of that other shall be the extent to, which he does it properly in accordance with those instructions, be treated for the purposes of this section as discharging the duty imposed on him by sub-section (1) above except where he owes a duty to that other to warn him of any defects in the instructions and fails to discharge that duty."[104]

It covers all those who might equally come within Article 1792 - 1 of the Code Civil, whether architects, builders or others.[105]

The exception to the fulfilment of the duty by compliance with instructions does not impose any duty to warn, nor does it identify a universally

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[100] Steel Co. of Canada Ltd. v Willand Management Ltd (1966) S.C.R. 746.

[101] In force from 1st January 1974. Introduced as "An Act to impose duties in connection with the provision of dwellings ...".

[102] The buildings in the duty to warn cases referred to above were not dwellings, but the Act was not referred in any of them in relation to the alleged duty to warn.

[103] Section 1 (1). This imposes liability for non-feasance as well as misfeasance, as where necessary work has not been done, as well as done badly; and unfitness may exist from that failure even though problems resulting from it have not become patent, Andrews v Schooling (1991) 1 W.L.R. 783 (C.A.).

[104] Section 1 (2).

[105] "Joseph, her husband, by profession a carpenter". There is no bar to contractors or subcontractors having to see that the work taken on is done in a professional manner in circumstances where it might be appropriate in place of "workmanlike". The obligation, to see that the work is done with proper materials and as regards that work the dwelling is fit for habitation when completed, is applicable to builder and architect alike and conversely provides no basis for detracting from the architect's duty to see that the work is done in a workmanlike manner.

applicable duty to warn of defects in instructions; where those instructions certainly will, probably will, possibly will, might or might possibly, in circumstances that certainly will, etc., occur, give rise to some deficiency in the dwelling. It leads to the search for circumstances where a duty exists on the part of a person who takes on work in connection with the provision of a dwelling, and who receives instructions, to warn against defects in them.[106] The compliance with instructions is applicable to "A person who takes on any such work on terms that he is to do it in accordance with instructions given by or on behalf of that other ..." but:

> "A person shall not be treated ... as having given instructions for the doing of work merely because he has agreed to the work being done in a specified manner, with specified materials or to a specified design."

The taker-on of work cannot rely on the fact of agreement by the giver of instructions for doing the work or design in a specified manner and with specified materials, as securing the first bastion towards compliance, namely "instructions given". This provides for both the layman position of an owner equivalent to the view taken of him in French law, and an attempt to negate the effect of a contractual obligation to carry out and complete works in accordance with plans, drawings and specifications as found in *Lynch v Thorne*.

If this aspect is correct then the effect, without reference to the statutory acknowledgement of a duty to warn, is that the traditionally conceived but statutorily imposed obligations as to workmanlike manner, proper materials and fitness for habitation override, and give rise to liability despite contractual obligations that would result in a defective dwelling. On this basis the mechanism available to the builder as in *Lynch v Thorne* ,[107] avoidance of liability for transgression of his statutory duty would in truth be "a deviation from the express language of the contract", and a breach of contract.

Contractual provisions specifying the manner, materials and design would be

[106] The search may be helped by reference to instructions but, it is suggested that, unless it results in the existence of the duty depending upon the provision of a dwelling and fitness for habitation, the duty to warn of defects in instructions is of general application and not limited to dwellings.

[107] With "an express contract as to the way in which the house was to be completed" and where any variation from the express provision "would have rendered this wall waterproof". Expressions from Lord Evershed M.R. (1956) 1 W.L.R. 303.

regarded as "instructions" albeit that "merely agreed" connotes passivity as distinct from required with knowledge, but, as agreement to have works done in a specified manner, materials or design is not to be taken as "having given" instructions, then the scope for recourse to compliance with instructions as an escape and thus to a duty to warn is likely to be minimal. The same would apply to instructions by way of variation.

Within the JCT forms were provisions which may have been in mind. In the 1963 edition if the contractor found any discrepancy in or divergence between the contract drawings, Bills of Quantities, instructions issued by the architect or further drawings or documents issued he was obliged to give notice of it.[108] Additionally, under an obligation to comply with Acts of Parliament, regulations or bylaws, if the contractor found any divergence between the statutory requirements and any of the documents so mentioned or a variation instruction he was again obliged to give notice.[109] These reflect an obligation only in circumstances where his particular knowledge and skill actually alerts him to deficiencies in what is being required.

The duty to see that the work taken on is done in a workmanlike manner, with proper materials and so as to be fit for habitation cannot by virtue of Section 6(3) be excluded by any contractual term, and any such term which purports to or has the effect of excluding or restricting the operation of the provisions of the Act or any liability arising by virtue of them is void.[110] It is unlikely that any different duty applies where there is an obligation to build so as to achieve fitness for purpose in works other than dwellings, albeit reliance is the touchstone. Total and exclusive reliance is not necessary but rather reliance on the taker on of work to some substantial extent as regards his skill and experience.[111] This is entirely consistent with the proposition in *Duncan v Blundell*, and reflects the status and obligations of such persons under civil law.

The Law Commission report recommending legislation categorised premises

[108] JCT Clause 1(2): now clause 2.3 of the JCT 1980 edition.

[109] JCT Clause 4(1); now clause 6.1 of JCT 1980 edition.

[110] So in essence a duty to warn exists as part of the obligation to achieve fitness for habitation.

[111] Cammell Laird & Co. Ltd. v Manganese Bronze & Brass Co. Ltd. (1934) A.C. 492 per Lord Wright p. 425 to 429. So that he is not a mere cipher, or as Roman law described it a *nudus minister*

as defective in the contractual sense where their condition falls short of the standard of quality which the purchaser was entitled to expect,[112] and properly contrasted defective premises from the point of view of tort liability as those which constitute a source of danger to the person or property of those likely to be in or near them.[113]

The Commission concluded that *caveat emptor* should continue to apply to the sales of dwellings previously occupied, but not for newly built dwellings,[114] for:

> "There is no reason why a person who acquires a dwelling from the builder should have to examine it in detail to see whether it is in a sound condition. He should be entitled to rely on the diligence and skill of those whose work has gone into the provision of the dwelling and he should have a remedy if the dwelling proves to be defective",

so reflecting the French position after 1978. The Commission's proposal was to avoid the implication of a term of the contract and to impose "an obligation of more than strictly contractual force since the benefit will pass to subsequent owners". The result is of major significance in that the duty is owed to a class far beyond those to whose orders the dwelling is provided, namely to "every person who acquires an interest (whether legal or equitable) in the dwelling, so that difficulties associated with assignment of the building or design contracts do not arise.[115]

The Commission did not think that the escape of showing compliance with the duty by following instructions should be available "in such cases as

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[112] Notwithstanding that the required standard of the duty was seen by the Commission as equating with the usual trilogy of implied terms, the Act has been construed as requiring defects rendering the dwelling unfit for habitation to be proved, not merely improper workmanship or materials; Thompson v Clive Alexander & Partners (1992) 59 B.L.R. 77.

[113] Civil Liability of Vendors and Lessors for Defective Premises, Law Commission No 40 16th November 1970. This was prophetic as to problems relating to the distinction."Because it appears to have contributed to the existence of some of the deficiencies in the present law. The proper development of the tortious liability for the narrower range of dangerous defects may have been inhibited by the erroneous belief that this would necessarily entail an extension of the contractual liability for defects of quality. In fact, while the same premises may be defective in both senses, the basis of liability is different and independent."

[114] The Law Commission restricted itself to dwellings on the basis that it was not aware of any substantial criticism of the then present law as it applied to commercial or industrial premises, and that whilst the justification for the principal of *caveat emptor* existed for those premises by the ability of a purchaser to satisfy himself by survey to ascertain its condition, shortage of living accommodation had weakened the bargaining position of purchasers of dwellings.

[115] As argued in St Martin's Proprty Corporation Ltd. v Sir Robert McAlpine Ltd., heard together and reported with Linden Gardens Trust Ltd. v Lenesta Sludge Disposals Ltd (1993) 3 W.L.R. 408.

Lynch v Thorne",[116] and it was dependent upon whether the employer had submitted plans and specifications for the builder to comply with, unlike in *Lynch v Thorne* where the builder provided plans to which the employer agreed.[117] "Instructions"[118] clearly includes plans and specifications,[119] but the extent of the discharge by compliance will depend on the scope attributed to not treating a person as having given instructions "merely because he has agreed to the work being done in a specified manner, with specified materials or to specified design". Restriction derive from mere agreement would though widen the ability of the builder to show compliance with architect's plans to achieve discharge; and it widens the scope of inquiry into a duty to warn.[120]

The Commission justified imposing the obligations on professional men,[121] adding:

> " ... those who, like specialist sub-contractors, hold themselves out as possessing skill in designing dwellings and their components have almost certainly a responsibility under the existing law to warn those who employ them if the plans or schemes which they prepare for the

[116] The justification for the exemption, or ability to show compliance with the duty by following instructions was:" ... when a builder takes on work under a contract which obliges him to build to a given design provided by or on behalf of the other party to the contract or in accordance with plans and specifications provided to him, then his obligation will be discharged if he builds in a workmanlike manner and with proper materials as specified. It is, of course, not uncommon in "tailor made" building or conversion for the "building owner" or his architect or surveyor to provide plans and specifications or to nominate the sub-contractor and specify the materials required for the performance of the builder's contract. The builder will not be liable if he adheres to instructions of these kinds which become terms of his contract provided that so far as his own work is concerned it is done in accordance with his instructions and is done properly.", Law Commission No. 14 para. 29.

[117] The principle of Lynch v Thorne that there was no room for the implication of an implied term as to fitness for purpose was, as it appears, only sought by the Commission to be overridden where the employer had agreed on the basis of the builder's plans and specifications and not those of his own or his agent. "We therefore propose that a "mere agreement" to accept plans, specifications or other instructions prepared by on or behalf of the other party to the contract should not enable the latter to escape the rigour of the statutory obligations. Where, however, the person accepting such specifications has done so after obtaining independent advice or in reliance upon his own judgment then to that extent there will be an easing of the statutory obligation."

[118] The draft Bill recommended by the Law Commission included: "(4) In subsections (2) and (3) above "instructions" includes plans and specifications and references to the giving of "instructions" shall be construed accordingly". This was not included in the legislation.

[119] There is express reference to them being given "on behalf of" the employer. In these circumstances the exception from discharge by compliance with such instructions where the builder owes a duty "to that other to warn him of any defects in the instructions" suggests a limitation of the duty extending only to warning the employer/owner and not any architect acting on the owner's behalf. The narrower perception of a duty to warn dependent on reliance by the employer directly on the contractor as perceived in the University of Glasgow case is, it is suggested, consistent with this and more probably correct.

[120] Conversely if an owner is taken to have "merely agreed" to his architect's design then the ability of the builder to rely on compliance with instructions at all is narrowed.

[121] "The imposition upon such persons of the proposed statutory obligation will recognise this responsibility."

purpose of use in house-building may result in unfitness for habitation."

The identified context of the duty to warn, however, had been on the part of designers whose designs would become or form part of the instructions; but this perception was not given this limit in the legislation by virtue of the compendious term "a person taking on work".

The guarantee scheme under the auspices of the National House-Building Council gave an exemption from of the 1972 Act, as it was until 1979 an approved scheme, since when this restriction on the operation of the measure ended. The impact and potential of this short and relatively simple legislation has not been appreciated to the full. The duty under it is additional to any duty otherwise owed. Its force will advance as standards of fitness for habitation advance. Its application cuts swathes through the murky depths of assignment of contracts and warranties, and rights of action or suits for the benefit of others, and tort.[122] The guarantee obligation subsequent to *la réception* represents the mechanism for recovery in France; in England there is the action for damages, and for dwellings the perception that the consumer is poorly served and subject to unnecessary complexity is unjustifiable. The feature of exemption by compliance with instructions certainly reflects the influence of the role of the architect, but the development of the duty to warn may produce a counter-balance. The future lies in the assimilation into the scheme of all premises and not solely dwellings.

[122] G. Robertson, Defective Premises and Subsequent Purchasers, (1983) 99 L.Q.R. 559; J. Cartwright, The Assignment of Collateral Warranties, (1990) 6 Construction Law Journal 14.: and s. 3 Latent Damage Act 1986.

[9] **RETENTIONS, BONDS AND GUARANTEES**

1 Retentions

The obligation to make interim payments will ordinarily arise either expressly by the terms of the particular form of contract, and in England by implication,[1] but the express terms may provide for retention money to be deducted and held until completion.[2] This is a common but not a necessary feature, reflecting a security for due performance in the hands of the employer and a, hopefully, temporary price reduction for the contractor. The express provisions of any contract as to the retention money determine however the point of release by reference to the state of the work.

Under the JCT 1980 scheme the retention deductible is five per cent unless a lower rate is agreed by the parties and specified.[3] Its deduction is in permissive terms from the total value of work materials and goods which falls to be included in any certificate where "practical completion" has not been achieved.[4] Where "practical completion" has been achieved the effect is to release one half of the Retention, and the remaining half is then retainable until the Certificate of Completion of Making Good Defects at the end of the Defects Liability period.[5]

Under most building contracts retention is seen as a security held by the Employer against final completion, and where the term "practical

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1 The Tergeste (1903) P. 26. Considered under Réception and Payment.

2 "Then entire performance is usually a condition precedent to payment of the retention money but not, of course, to the progress payments. The contractor is entitled to payment pro rata as the work proceeds, less a deduction for retention money. But he is not entitled to the retention money until the work is entirely finished, without defects or omissions.", Denning L.J. in Hoenig v Isaacs (1952) 2 All E.R. 176 at 181.

3 Clause 30.4.1.1. Three per cent is usual for contracts whose value is over £500,000.

4 Clauses 30.2 and 30.4.1.2.

5 Clauses 17.4 and Clauses 30.4.1.3. Earlier forms had made release of the retention dependent on certification for that purpose.

completion" is used then it is to be taken as complete in every sense and without patent defects.[6] Final completion depends on the nature and extent of the contractor's responsibilities under the contract after practical completion. This state of practical completion derives from the JCT scheme where it is only in respect of defects appearing after that time that there is an obligation during and at the conclusion of the Defects Liability Period to remedy them. Hence the reduction in retention under JCT 1980, but to allow a contractor to recover retentions when there are patent defects would defeat their purpose.

The condition of release of the second half of a retention at the end of a defects liability or maintenance period is a sensible and practical benefit to an Employer, for the use and occupation of works for a period after "practical completion" provides the opportunity for the works to be truly tested and defects that may not have been apparent to come to light. The formal aspect of a Certificate of Making Good Defects in the JCT 1980 scheme recognises a stricter approach to the release of retention on final completion of all contract obligations.[7] The point identifies the basis of sanction against failure of the contractor to perform completely as within the concept of entire contracts.

Where retained by an employer questions arise as to the basis upon which it is held and the rights of others in respect of it. This is particularly important both in the case of sub-contractors whose work and materials have been the subject of such retention, and in circumstances of insolvency. The mechanism of the trust has been deployed, and the forerunner was the F.A.S.S. form of sub-contract[8] of which Clause 11(h) provided that to the extent that an amount retained by the employer under the main contract included retentions under the sub-contract then the main contractor's interest in it was fiduciary as trustee for the sub-

[6] Jarvis & Sons Ltd. v Westminster City Corporation (1970) 1 W.L.R. 637 at 646, per Viscount Dithorne. P & M Kay Ltd. v Hosier & Dickinson Ltd. (1972) 1 W.L.R. 146 at 164, per Lord Diplock. Applied in H.W. Nevill (Sunblest) Ltd. v William Press Ltd (1981) 20 B.L.R. 78.

[7] The effect was summarised in Hoenig v Isaacs: "In the present case the contract provided for 'net cash as the work proceeds, and balance on completion.' If the balance could be regarded as retention money then it might well be that the contractor ought to have done all the work correctly, without defects or omissions in order to be entitled to the balance.", (1952) 2 All E.R. 176 at 181, per Denning L.J..

[8] Issued under the auspices of the National Federation of Building Trades Employers and the Federation of Associations of Specialist Subcontractors.

contractor.

This provision was considered in 1954 in *Re: Tout and Finch*[9] where it was held to have made a valid equitable assignment of the right to the material part of the retention to the sub-contractor who was entitled to the amount, whether in the hands of the employer or the liquidator who had been appointed on the voluntary liquidation of the main contractor prior to the end of the defects liability period.

For main contractors merely to have a contractual right to be paid retentions would be of little value on the employer's insolvency, and similar wording followed in the JCT 1963 editions of contracts[10] in respect of retentions from the main contractor so as to create a trust n favour of the main contractor binding on the employer. The wording was "Fiduciary as trustee for the Contractor" (but without obligation to invest)[11] and the interest of the Contractor was expressed as a beneficial interest.

One aspect arising on this attempt to give an identifiable interest in the retention that would be binding on any trustee in bankruptcy or liquidator appointed on the employer's insolvency, was the securing or appropriation of the fund for the trust in order to identify the monies held, and for it not to fail for inability to trace the monies.

Notwithstanding no express obligation on the employer to appropriate and set aside as a separate trust fund the sums withheld as retentions or their equivalent, injunctions were granted to secure this result. The conclusions were that without that obligation the term as to the trust could not have any practical application, and that the beneficial interest of the contractor

[9] Re: Tout and Finch (1954) 1 W.L.R. 178. It constituted the contractor a trustee of his contractual rights against the employer to receive the monies retained after the end of the defects liability period a trust of the close in action. Clause 11(h) also gave the contractor the right to free his contractual right to monies retained by the employer from the trust in favour of the sub-contractor by setting aside other monies as a substituted trust fund. It was followed in Rayack Construction Ltd. v Lampeter Meat Co. Ltd (1979) 12 B.L.R. 30, and Re: Arthur Sanders Ltd.(1981) 17 B.L.R. 125.

[10] The 1939 Editions of the R.I.B.A. form had provided an option, that amounts retained should constitute a Retention Fund which had to be placed in a bank account in the joint names of the employer and contractor. Particular problems arising on insolvency in the construction industry are addressed in R. Davis, Construction Insolvency.

[11] This remains in the JCT 1980 scheme where Clause 30.5.1 provides: "the Employer's interest in the Retention is fiduciary as trustee for the Contractor and for any Nominated Sub-Contractor (but without obligation to invest)."

could only subsist in a fund so appropriated and set aside.[12] Equally, the trust fund provides protection to the employer to the extent of the fund against the risk that his claims for breaches by the contractor would rank as unsecured debts, as well as to the contractor.

Another aspect is the ability to uphold retention money provisions in the face of insolvency if it is argued that there can be similar difficulties as attach to provisions for direct payment of sub-contractors, namely the creation of a preferential debt offending against the *pari passu* rule applicable on liquidation.[13] Where retentions are the subject of a trust the judicial view expressed[14] was that such provisions were unaffected by the decision in *British Eagle*.[15] Indeed on the operation of the scheme, once the retention is set aside as a trust fund with the contractor having a beneficial equitable interest in it then the retention monies would not be part of the property of the company at the time of a liquidation of an employer.

In the case of *Re: Arthur Sanders Ltd.* [16] where an employer had entered into two building contracts with a contractor who went into liquidation and the end result was that it owed retentions to the liquidator on one contract but was owed a greater sum by the liquidator on the other, it was held that there could be no mutual set-off applied under the then applicable Bankruptcy Act 1914 in respect of that part of the retentions referable to the nominated sub-contractor's work which the liquidator was entitled to receive as trustee for the sub-contractors. Under the main contract, although the employer was not required to set aside a retention fund, the court applied to the solvent employer the equitable maxim of looking on that which ought to be done as having been done and not allowing him to take any advantage from his failure. This fund then

[12] Rayack Construction Ltd. v Lampeter Meat Co. Ltd (1979) 12 B.L.R. 34. An express obligation on the employer to place the Retention in a separate bank account incorporated in the JCT 1980 form, but not in the Local Authorities' Edition, only the Private Edition.

[13] I.N. Duncan Wallace: Hudson"s Building and Engineering Contracts, 10th Edition and Supplement, by reference to British Eagle International Airlines Ltd. v Cie. National Air France (1975) 1 W.L.R. 758 (H.L.) The *pari passu* rule is now in the Insolvency Act section 127.

[14] Re: Arthur Sanders Ltd (1981) 17 B.L.R. 125.

[15] British Eagle International Airlines v Cie. Nationale Air France(1975) 1 W.L.R. 758 (H.L.). The I.A.T.A. clearing house for monthly settlement of debts and credits between members was considered and the conclusion was that the rules for liquidation should prevail over the arrangements as a matter of public policy. It was, per Lord Cross, ".... irrelevant that the parties of the 'clearing house' arrangement had good business reasons for entering into them."

[16] (1981) 17 B.L.R. 125.

attracted the trust of the contractor to the extent of the retention applicable to the sub-contractors' works under the provision of the forms of sub-contract which had been considered in *Re: Tout and Finch*. Neither the determination of the employment of the main contractor nor the provision for final accounting between employer and main contractor could interfere:

> "... once the sums notionally set aside under that provision [in the main contract] have become impressed with whatever is the trust upon which they are held they remain subject to that trust whatever the fate of the contractor's employment or of contract itself."[17]

The sub-contracts had taken effect as assignments to the sub-contractors of their due proportion of the main contractor's beneficial interest in the retention monies following *Re: Tout and Finch*, and the employer was holding the proportions in trust for the main contractor as trustee for the sub-contractors,[18] so overcoming the clause in the main contract providing that nothing in it should render the employer in any way liable to any nominated sub-contractor. Thus the main contractor no longer had a beneficial interest in the sub-contractors' due proportion of the retentions, and having no such interest it was not due to him in such a way as to permit the employer to raise a set-off against it.

The importance of the effective assignment and the framing of the mechanism in respect of retentions was emphasised by the decision in *Re: Jartay Developments Ltd.* [19] where the development agreement provided for the employer to retain sums from payments to be made to Jartay which were to be sums certified by Jartay's architects. Jartay contracted with builders on a JCT form of main contract but they had not appropriated the retained sums under it for the trust contemplated. On Jartay's liquidation the builders sought a declaration that the sums still retained under the development agreement by Jartay's employer were held in trust for them and were not to pass to the liquidator. The conclusion was that an order against Jartay to establish the fund was not available after liquidation, and as none of the retention held by Fortay had been set aside the builder could

[17] Re: Arthur Sanders Ltd (1981) 17 B.L.R. 125, per Nourse J. at 137.

[18] The point of the assignment had arisen because the JCT 1963 form had made no provision in relation to the retention for nominated sub-contractors and the JCT 1980 expressly makes the employer trustee for the nominated sub-contractors.

[19] Re: Jartay Developments Ltd. (1982) 22 B.L.R. 134.

not claim to be treated as if it had. As against Jartay's employer, whilst there was nothing in the development agreement to have prevented Jartay assigning its rights against the retention under it, the contract between Jartay and the builders did not contain any assignment to the builders of such right. The provisions of the two contracts as to certificates, payments and retentions were different and no implied assignment of intention for such could have arisen. An employer's informal solvency at the time of the application may however affect the enforceability of a contractor's right to a fund, for in *MacJordan Construction Ltd. v Brookmount Erostin Ltd.* [20] administrative receivers had been appointed, and the court was unwilling to take an action that might prefer the contractor to other unsecured creditors.[21]

The express requirement to appropriate and set aside a retention fund incorporated in the case of an employer utilising the JCT 1980 Private Edition is quite unnecessary because of the reference to the position of the employer as fiduciary. This was the result in *Wates Construction (London) Ltd. v Frantham Property Ltd.* [22] where even the actual deletion of the clause containing the obligation did not negate it, on the basis that the deletion could not have attributed to it other than speculative reasons and therefore was not to be used in the construction:[23]

> ".... clause 30.5.1 creates a clear trust in favour of the contractor and sub-contractors of the retention money of which the employer is the trustee. The employer would be in breach of his task if he hazarded the fund by using it in his business and it is his first duty to

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[20] MacJordan Construction Ltd. v Brookmount Erostin Ltd. (1991) 56 B.L.R. 1 (C.A.), "In a case where the employer is insolvent when the application for a mandatory order is made, ... (it) ... would, assuming it were complied with, give preference to the contractor as against other secured creditors. I do not see any reason why the Court should do such a thing. If the directors of an insolvent company were, pursuant to a clause such as clause 30.4.2.1, to set aside a retention fund for the benefit of a building contractor, questions of preference might well arise (see section 239, Insolvency Act 1986). So far as preference is concerned, the appropriation of assets to constitute the retention fund would be no different, in my opinion, from the payment of any other contract debt.", per Scott L.J. at p. 16 in the judgment of the Court.

[21] Insolvency principles identified in Roberts Petroleum Ltd. v Bernard Kenny Ltd. (1983) 2 A.C. 192 (H.L.) have given rise to debate as to whether this approach is correct, G. Moss "Retention Trusts", Insolvency Intelligence, vol. 5, April 1992.

[22] Wates Construction (London) Ltd. v Frantham Property Ltd(1991) 53 B.L.R. 23 (C.A.).

[23] The Court of Appeal preferred the general rule of Viscount Summer in M.A. Sassoon & Sons v International Banking Corporation (1927) A.C. 711 (H.L.) at 721, that the effect is as if the deleted words had never formed part of the point at all, rather than the use of the deletion "as part of the surrounding circumstances in the light of which one must construe what they have chosen to leave in" per Lord Cross in Mottram Consultants Ltd. v Bernard Sinley & Sons Ltd. (1974) 2 Lloyd's Rep. 197, which use was taken as applicable "exceptionally".

safeguard the fund in the interests of the beneficiaries."[24]

The contention that the interest of the beneficiaries was sufficiently protected without a separate bank account, provided the sum was identifiable, because they would have a right in equity to trace, was rejected. That right depended on the ability to identify a fund into which the money had been placed, and it was of no value if, for example, the money had been paid out to general creditors who had given value and without notice.[25]

For the employer, the benefit of a retention is to that extent to secure him against the risk of breach by the contractor in relation to the obligation to achieve performance by completing satisfactorily. Where by the contract the trust in respect of the fund is created it is to that contract the employer must look for recourse, and it is here that the trust and the contractual right divide. That benefit to the employer is not, under the JCT 1980 scheme, such as to enable him to be a beneficiary of the trust. Clause 30.1.1.2 of JCT 1980 provides:

> "Notwithstanding the fiduciary interest of the Employer in the Retention ... the Employer is entitled to exercise any right under this Contract of deduction from monies due or to become due to the Contractor against any amount due under an Interim Certificate whether or not any Retention is included in that Interim Certificate ...",

and the argument that the employer was a beneficiary under the trust, having an immediate or contingent interest in the retention because of his entitlement to make deductions from it under the contract, was rejected by virtue of those terms rendering the employer solely a trustee for the main contractor and nominated sub-contractors and not simultaneously a beneficiary.[26]

Not being a beneficiary but with his rights governed by the express

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[24] Beldam L.J. at page 37.

[25] Beldam L.J. at page 31-32.

[26] Wates Construction (London) Ltd. v Frantham Property Ltd. (1991) 53 B.L.R. 23, per Beldam L.J. at 30. Further: "... the nature of the retention fund confirms this view of the trust which was created. It was a fund which was made up of sums which had been measured and was due, subject to the performance subsequently of conditions, to be paid to the contractor and the sub-contractors. It was payable, unless the contractor or sub-contractors failed to fulfil their obligations under the contract, and subject only to the deductions which the employer was by the terms of the contract entitled to make from the fund.", per Beldam L.J. at page 31.

provision permitting deduction the fund could become a yo-yo in the hands of the employer/trustee, governed by his evidence as to the contractor's performance. The potential, but unevidenced, claim for liquidated damages for delay referred to in *Rayack v Lampeter* [27] was insufficient to prevent the injunction to establish the fund, notwithstanding the acknowledgement that such a maintainable claim would entitle the employer "to withdraw the equivalent from the trust account." A mere contention as an entitlement to deduct is insufficient and even, where an arguable case existed in respect of a right to deduct by reason of defects, that did not defeat an application requiring the setting aside of a fund.[28] Although the employer had already raised its claims for defects, failure to achieve practical completion and liquidated damages, the conclusion was that these were "speculative, in the sense that it is a matter for speculation whether the employer will ultimately succeed in proving its contentions," and that such an arguable right to deduct did not hold sway.[29]

The point at which an employer's entitlement to deduct arises is important for where the employer had such a right to deduct based on a certificate under the contract no order requiring the fund was made.[30] Conversely, an order was made where an employer's claim was not based on a certificate as would bind the parties immediately.[31] The entitlement to deduct will depend on the terms of the contract and the strength of the employer's case at the time of the application for establishing the fund. Whilst a contractor

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[27] Rayack Construction Ltd. v Lampeter Meat Co. Ltd. (1979) 12 B.L.R. 30 at 39.

[28] Concorde Construction Co. Ltd. v Colgan Co. Ltd (1984) 29 B.L.R. 120 (High Court of Hong Kong). The provision was that the beneficial interest of the main contractor in the retention was "... subject only to the right of the Employer to have recourse thereto from time to time for payment of any amount which he is entitled under the provisions of this contract to deduct from any sum due or to become due to the Main Contractor."

[29] "I do not think an employer is entitled to have recourse on the trust fund of retention monies simply on the strength of his own belief that he has a good claim which entitles him to such monies. The Court cannot countenance a situation where the employer would, in effect, be the judge in his own cause and able to say when he would make deduction from the retention monies. Allowing the employer to free the retention monies from the trust whenever the employer claimed entitlement to a set-off would drive a coach and horses through the whole system of protection ...", Rhuid J. at page 133.

[30] Henry Boot Building Ltd. v The Croydon Hotel & Leisure Co. Ltd (1985) 36 B.L.R. 41, [C.A.]. In that case a certificate of the architect's opinion that the works ought to have been completed by a date, that gave rise to an entitlement to liquidated damages.

[31] J. Finnegan Ltd. v Ford Sellar Morris Developments Ltd [1991] 53 B.L.R. 38, where unlike in Henry Boot, under the form of JCT Contract with Contractor's Design, 1981 edition the employer's notice of intention claim liquidated damages for delay did not have a binding effect on the parties unless and until set aside by an arbitrator.

under the JCT form does not have to make a request for the set aside of the fund on each occasion when retention is deducted from interim payments[32] delay in an application for an injunction to secure that result may be fatal both in respect of the decision on an equitable remedy, and because the later the application the greater time is given for events to occur that may give rise to claims to deduct by employers. So that where such claims, including equitable set-off, were extant and evidenced it was concluded that there was no subsisting obligation to appropriate and set aside a fund.[33]

Notwithstanding the obligation to establish a trust fund of monies retained, the nature of retention as a security for the employer against breach by the contractor of his obligations enables the central feature of even establishing the separate fund to be defeated. Thus whilst the trust itself exists, in respect of retentions that which is within the trust is and remains available to the trustees to satisfy his security and to defeat the interest of the beneficiary. The cases to date concerned with defeating the obligation to set aside the fund have concentrated on the ability to deduct by reference to the strength of the evidence as to the potential of employer's claims, and it seems that little attention has been paid to the duties of the employer as trustee and their incompatibility with his contractual right which is effectively to remove the fund from its trust to satisfy his own financial interests. In short the nature of a retention renders the position of the employer as a trustee incompatible. No employer could reconcile his ability to look to the fund for his claims to deduct with the duties of trustees, and the scheme clearly offends the principle that a "trustee must not place himself in a position where his duty and his interest may conflict."[34]

The function of the retentions and their monetary importance as a percentage close to the extent of profit of many contractors, points to the need to establish an independent third party as the trustee, if the use of the

[32] J. Finnegan Ltd. v Ford Sellars Developments Ltd. (1991) 53 B.L.R. 38.

[33] GPT Realisations Ltd. v Panatown Ltd. (1992) C.I.L.L. 788.

[34] Lord Upjohn in Boardman v Phipps (1967) 2 A.C. 46 at 123. Although it is n authorised conflict

trust is to persist[35] and current awareness in the field of pension funds of the need for independent trustees may assist in bringing such a change about. Alternatively the use of guarantees and retention bonds, extensively used in civil law countries, may become more prevalent in England. The limitations of the time for retention do not give it a greater efficacy than the performance guarantee.

In England the development of the forms of building contract imported the trust in an attempt to balance the securing of the retention for the benefit of contractors and sub-contractors against its purpose as an amount available to the employer to satisfy his ability to recover for liabilities of the contractor. This is distinct from engineering forms where the ICE conditions avoid provision for the employer as fiduciary, or setting aside funds.[36] This is equally so under the FIDIC conditions, where the engineer certifies the amount of payment due to the contractor subject to the retention,[37] so that how the retention under the FIDIC conditions would be viewed in France is to be compared with the lack of
safeguard under English law without an expressed fiduciary capacity of the employer.

French legislation

In France there has been direct legislative action illustrating the concern of the State for the regulation of retentions and protection for contractors, so as to import a balance and not leave the matter to contract and the economic strength of individual parties. The legislation introduced in 1971[38] provided simple and general rules limited to private works, and

[35] It will persist in the sense that the fiduciary position of the employer is embodied in the JCT standard forms. This would also point to the problem if the work were practically complete and the employer is placed in administrative receivership and will not release the retention, The contractor would have to look to the determination of his employment, or to specific performance.

[36] The reference in the 5th Edition to a "reserve ... accumulated in the hand of the Employer ..." disappeared in the 6th Edition.

[37] Clause 60.2 (a)

[38] Loi No 71-584 of 16th July 1971. The 1967 legislative changes included the alteration of Article 1779 so as to identify as one of the three principle types of such contract, *"Celui des architects, entrepreneurs d'ouvrages et techniciens par suite d'études, devis ou marchés "*, and affect those connected with building works in a wider sense than just the employer and contractor under a building contract. It was by reference to this wider relationship that the law of 1971 was introduced.

Article 1 commences[39] with an effective permission to deduct retention, with an overall limit of five per cent of the total value. Its nature is identified as a retention and contractual guarantee to satisfy the remedying of those matters made the subject of reservation at the time of *la réception*. For this reason the formulation of the reservation at *la réception* is of importance, but, dealing, as they will, only with the visible, the contractor's obligations as to the hidden remain.

The next step is that the employer has actually to deposit a sum equal to the retention into the hands of a depository, who has to be agreed by the parties.[40] The obligation on the employer continues in respect of retentions made subsequent to the initial deposit, by the requirement to increase the deposit where sums are retained in excess of it.[41] Article 1 concludes by enabling the contractor who would by contract be obliged to suffer the deductions to avoid them by providing a guarantee.[42]

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[39] Article 1: *"Les paiements des accomptes sur la valeur de finitive des marchés de travaux privés visés à l'article 1779-3 du Code Civil peuvent être ampatés d'une retenue égale au plus à 5 p.100 de leur moutant et garantissant centractuellement l'exécution des travaux, pour satisfaire, le cas échéaut, aux réserves faites à la reception par le maître de l'ouvrage."*
[Payments by instalments against the final value of those works under private agreements referred to in Article 1779-3 of the Code Civil may be made the subject of a retention as a contractual guarantee of the execution of the works in order to satisfy those matters reserved by the Employer upon la reception in the event of failure to remedy them.]

[40] In default of such agreement it is the courts by the President of a Tribunal of Grande Instance or of Commerce who decide on the depository: *"Le maître de l'ouvrage doit consigner entre les mains d'un consignataire, accepté par les deux parties ou à défaut désigné par le president du tribunal de grande instance ou de tribunal de commerce, une somme égale à la retenue effectuée."* [The Employer must deposit into the possession of a depository agreed by the parties or, in default deter by the President of a Tribunal de Grande Instance or Tribunal de Commerce a sum equal to the retention deducted.]

[41] Article 2: *"Dans le cas où les sommes acjant fait l'objet de la retenue de guarantie dépassent la consignation visée à l'alinéa précédent, le maître de l'ouvrage devra compléter cell-ci jusqu'au montant des sommes acàsi retenues. "*
[Where sums have been made the subject of a retention in excess of the deposit provided for above the employer must increase the deposit up to the amount of the retention in the like manner.]

[42] Article 1 conclusion: *"Toutefis, la retenue de garantie stipulée contractuellement n'est pas pratiqueée si l'entrepreneur fouruit pour un montant égal une caution personelle et solidaire émanant d'un établissement financier eant sur une liste fixée par décret. "*
[Notwithstanding the above the retention provided for by contract shall not be made if the contractor furnishes a joint and several bond secured from a financial institution whose name appears on a schedule given by decreee.]
The decree is No. 71-1058 of 24th December 1971.

Article 2 [43] provides for the release of the sums which have been deposited on the release of the guarantee at the end of a year after *la réception* , whether concluded with or without reservations as to defects or incomplete work. The release takes effect unless the employer has given notice to the depository or surety of objection on the grounds of the contractors failure to discharge his obligations. Liability in damages is imposed for objection made without proper reason.

The law is part of *l'ordre public* for any agreement or provision which seeks to exclude or contravene Articles 1 and 2 is void,[44] and with this legislative scheme in place the AFNOR conditions provide for the deduction of retentions of 5% from payments by instalment, unless particular provision is made specifying a lower percentage, and that this is governed by the legislation in force.[45] By amendment introduced in 1972 [46] the law was made applicable to sub-contract works, and the scheme impinges on retentions made by main contractors as well as by employers in respect of sub-contractors' works. The identification of such retentions from sub-contractors' works is assisted by the AFNOR 1991 conditions which require the value of work performed by sub-contractors to be distinguished.[47]

The FIDIC conditions[48] do not provide any upper limit on the retention

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[43] Article 2: *" A l'expiration du délai d'une année à compter de la date de réception, faite avec ou sans réserve, des travaux visés à l'article précedent, la caution est libérée ou les sommes consignées sont versées à l'entrepreneur, même en l'absence de mainlerée, si le maître de l'ouvrage n'a pas notifié à la ution ou au consignataire, par lettre recommendée, san opposition motivée par l'inexécution des obligations de l'entrepreneur. L'opposition abusive entraine la condemnation de l'opposant à des dommages - intérêts.'*
[Upon the expiry of one year from the date of *la réception* of works referred to in the above article, whether made with or without reservation, the bond shall be released or the sums deposited paid to the contractor, even in the absence of delivery up if the has not given notice to the surety or depository, by recorded delivery, of objection on the grounds of failure by the contractor to comply with his obligations. Objection without proper justification gives rise to liability on the objector for damages.]

[44] Article 3: *'Sont neuls et de nul effet, quelle qu'en sont la forme, le clauses, stipulations et arrangements, qui auraient pour effet de faire éclec aux dispositions des articles 1er et 2 de la présente loi. "*
[Terms, stipulations and arrangements which have an effect converse to Articles 1 and 2 of this Law are void and of no effect.]

[45] AFNOR 1991, Article 18.5

[46] Law No 72-1166 of 23rd December 1972 inserted Article 4 in Law No 71-584: *" La présente loi est applicable aux conventions de sous - traitance. "* [This Law is applicable to contracts for sub-contracting.]

[47] AFNOR 1991, Article 17.1.1.

[48] FIDIC 4th Ed. Clauses 60.1(c), and 60.2: Dr.N.G. Bunni, The FIDIC Form of Contract, 1991, p. 232.

leaving it to be specified in the Appendix so that provision for more than 5% would be struck down. It has been noted however that the extent of the retention percentage has been reducing over time,[49] and this must be seen in relation to the increasing usage of performance guarantees. The retention is not simply a security against defects but against any contravention of the contractor's obligations. The English approach of reducing the retention at the point of practical completion detracts from the employer's security at the very stage when he may need it most, both because of potential loss from latent defects and as a means of inducing the contractor to perform his obligations arising during and at the end of the defects liability period.[50] The French scheme avoids this aspect, but both would require a formulated and quantified claim on the retention by reference to breach by the contractor at the conclusion of the stipulated period after practical completion or *la réception*.[51]

The inclusion of the retention money bond in the French legislation reflects the perception of the retention as one aspect of protection as well as the greater use made of guarantees in civil law jurisdiction. Under English contracts it is suggested that difficult questions arise as to the ability to make a call on such bonds, namely whether it is intended as a means whereby the employer may unilaterally at any stage in effect revert to withholding of retention by calling the whole fund, or, whether its purpose provides only a "draw down" of such sums up to the limit reflecting the quantified consequence of a particular default.[52] The answers depend on the terms, but equally critical is the unlikely ability of any employer satisfactorily to determine his loss at a stage when in England the first half of the retention ordinarily becomes payable. Deficiencies during the work will not usually give rise to the employer suffering damage where the payment obligation

[49] M. Abrhamson: Engineering Law and the I.C.E. Contracts, 4th Ed. p. 265.

[50] The JCT form includes a period of 6 months, unless some other period is specifically provided by the parties. The ICE form includes for 12 months.

[51] The one year period in Law No. 71-584 of 16th Jul. 1971, and that save for the defects liability period in AFNOR 1991.

[52] J. Uff & E. Jones (eds.), International and ICC Arbitration, 1990, Conference Papers, Professor P. Capper, Bonds and Guarantees: Their Various Types and Problems.

extends only to such work as has been "properly executed".[53] Similarly under AFNOR the valuation by the employer's agent and payments depend on the due discharge by the contractor of his obligations.[54]

The existence of patent defects negates practical completion and the obligation to release of the first half of the retention, but deemed practical completion under JCT 1980 occurs on the employer taking possession.[55] At that point the employer must have identified and quantified his loss consequent on extant defects to have recourse to the retention. If the contractor is in delay in achieving practical completion and the architect has already so certified[56] then the ability to deduct is extant, but otherwise the obligation to pay over the retention on that date gives rise in practise to a scramble.[57] It is against this background that the performance guarantee or bond in relation to the whole works becomes a more desirable vehicle as security for the employer.

The code for public works in France utilises the performance guarantee[58] as security for due performance,[59] and although nothing in the CCAG excludes a retention its only provision concerning this is to enable a bond to be substituted for any contract requirement for a retention, either at the outset or at any later stage.[60] The object of the retention money bond is to enable payment of the retention sums to be made to the contractor without waiting for the expiry of the defects period, and in the hands of the issuing bank it represents those sums that would otherwise fall due for deduction

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53 JCT 1980 Clause 30.2.1.1. Further the argument may be deployed that such are there "temporary disconformities" per Lord Diplock's dissent in Kaye (P & M) Ltd. v Hosier & Dickinson Ltd. (1972) 1 W.L.R. 146 at 165., giving rise to neither breach or damage during the work given the contractor's obligation to complete properly; but this argument did not succeeed in Nene Housing Society Ltd. v National Westminster Bank (1980) 16 B.L.R. 22.

54 AFNOR 1991 Articles 17.4, (17.4.1.1 and 17.4.1.5) and 18.1.

55 JCT 1980 Clause 18.

56 Under JCT 1980 Clause 24.2.1.

57 Particularly where the architect has to consider and re-consider questions of delay and extensions of time in the six week period after practical completion., under JCT 1980 Clauses 24.2.2 and 25.3.1.

58 CCAG 1991/2, Article 4.1, 4.11.

59 Again up to five per cent, CCAG 1991/2, Article 4.13.

60 CCAG, Article 4.2: " *Retenue de garantie: Lorsque les dispositions réglementaires le permittent, si le marché comporte, au lieu d'un cautionnement, une retenue de garantie, le remplacement de cette retenue de garantie par une caution personelle et solidaire, dans les conditions prévues par les règlements, peut intervenir, soit à l'origine, soit à tout moment. La retenue de garantie est alors restituée.* "
[When the regulating provisions allow, if the contract provides for a retention, instead of a guarantee, thenstitution of a joint and several bond on the conditions provided may be made either at the outset, or at any stage. The retention is then released.]

from the retention.[61] The facility for the translation of the sums retained into a bank guarantee at any time and prior to *la réception* shows the perceived equivalence of the retention to the performance guarantee.[62]

The EEC Conditions[63] adopted by the Council decision of 16th December 1991 incorporate a retention sum to be "retained from interim payments by way of guarantee to meet the contractor's obligations during the maintenance period" with the limit imposed of 10% of the contract price.[64] The substitution of a retention guarantee is expressly permitted,[65] and release is within 90 days of final acceptance. Doubtless this reflects the economic strength deriving from EEC funding and the greater risk in overseas territories; but, apart, from continuation of retentions simply because that is what has been done before the way forward in civil law jurisdictions is likely to be the amalgation with, or replacement of retentions by performance security for the entire works, as in the Netherlands UAV conditions.[66]

2 Bonds and Guarantees

One aspect of bonds and guarantees is to offer assurance of payment or compensation from a solvent paymaster in the event of defaults by a contractor during the construction process, and also during tendering. From a recognised mechanism in international trade they have become an important part of construction contracts and the applicable rules and problems posed are similar in France and England.

In addition to performance and retention money bonds, *la garantie de*

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61 Dictionaire Joly, Pratique des Contrats Intrenationaux, 2nd Ed. 1989 Livre VII.

62 Dictionaire Joly, Pratique des Contrats Intrenationaux, 2nd Ed. 1989 Livre VII.

63 Official Journal of the European Communities, Issue 0378-6978, L40, Volume 35, 15th Feb. 1992. These general regulations general conditions and procedural rules on conciliation and arbitration for works, supply and service contracts are for those financed by the European Development Fund (E.D.F.) for qppcation in the association of the overseas countries and territories (OCT) with the EEC. Council Decision 92/97/EEC.

64 EEC 1992 Article 47.1.

65 EEC 1992 Articles 47 and 15.3.

66 Uniform Administrative Conditions for the Execution of Works, 1989, UAV 1989, Clause 43.

dispense de retenue, tender,[67] and advance payment bonds,[68] are common. The performance bond may not be tied to any particular default within the range of the contractor's obligations. Rather it may be required simply to cover a given percentage of the tender total, throughout the period of construction and without regard to the increasing value of performance received. It is an incentive to performance without particular regard to the nature or extent of any particular default.

Inevitably the first question for determination is upon what terms may the bond be called.[69] The conditional bond is the more prudent form, from the contractor's viewpoint, for the obligation to pay will be conditional upon proof by the beneficiary of the requisite default,[70] and the nature of the condition is critical, as is the event which triggers the obligation of payment. The major distinctions within all types of bonds and guarantees are as to the degree of ease with which payment can be called for.

Problems arise because of the preference for different reasons of both employers and banks for guarantees in "first demand" form.[71] The bank's undertaking will be to pay on demand without proof or conditions.[72] As between the bank and the employer such a bond is tantamount to cash in

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[67] The tender bond, *la guarantie de soumission*, will accompany the contractor's tender to give assurance of the contractor's earnest to contract if the tender is accepted and provide a mechanism for compensation if the contract has to be re-awarded. It exists without any underlying contract between the employer and contractor where the invitation and submission of a tender give rise to obligations readily appreciated by the civil law; the obligation of good faith in negotiations. See Section B, and also for potential development, the Canadian case of Northern Construction v Gloge (1986) 2 W.W. R. 649, and D.R.Percy, Radical Developments in the Law of Tenders: A Canadian Reformation (1988) 4, Construction Law Journal 171.

[68] The advance payment bond, or repayment guarantee, *la garantie de restitution d'accompte*, safeguards the client employer in regard to re-payment of large sums advanced early in the construction process. Depending on its terms it may have a purpose of redress to a client upon contractual default by the contractor, as does the ICC Model Form of Repayment Guarantee, or be restricted to the unapplied balance of the advance, as in Mercers v New Hampshire Insurance Co. (1992) 2 Lloyd's Rep. 365.

[69] This raises the point as to the applicability of the principle of co-extensiveness between obligations in the bond or guarantee and the underlying contract, G. Andrews & R. Millett Law of Guarantees, 1992.

[70] Such an instrument is less attractive to the banking community. It may draw the bank into complex contractual disputes as between the employer and the contractor. It does offer valuable utility, for, upon proof of default, the employer is assured of a solvent paymaster for the sums by way of compensation found to be payable.

[71] These have been introduced relatively recently in the history of building contracts having evolved from commercial sale contracts with the guarantee of an automatic consequence, of payment, upon a particular event.

[72] Such a performance bond or guarantee was described as "a new business transaction" in the Edward Owen case, and, equally, in Dictionnaire Joly, Practique des Contrats Internationaux (1989) 2nd Ed. Livre VI, as a new form of guarantee.

the hand of the employer,[73] deriving from agreement to pay without reference to or limiting effect of proof of default under the underlying contract.[74]

In France the first demand guarantee, *la garantie à première demande*, is equally treated as an agreement to pay a fixed sum made in connection with an underlying contract guaranteeing its execution, but constituting an independent guarantee obligation and characterised by the inability to oppose its call save in exceptional circumstances. It has given rise to much litigation and was judicially defined as an agreement where the guarantor has contracted not to dispute payment nor to raise any objection to it for any reason.[75] Two important principles were ascribed. First that of irrevocability of the demand save in cases of fraud or manifest abuse. The provision of the guarantee prevents the interference with the basis of the trigger of the event.[76] Second, the independence of the first demand guarantee from the underlying contract, such that the operation of the guarantee is only subordinated to observation of those conditions that are expressly building on it.[77] The nullity of the underlying contract or its termination does not affect the guarantee which remains unaffected to be fulfilled; and the duration of the guarantee is fixed independently of the

[73] Distinctly recognised in France by the Cour de Cassation, Cass. Com., 20th Dec. 1982: D., 1983. 365, note M. Vasseur. Also as seen in Edward Owen Engineering Ltd. v Barclays Bank International Ltd. and Umma Bank (1978) Q.B. 159 (C.A.); where English suppliers contracted with Libyan customers to erect greenhouses there on terms that the customer was to pay by instalments by a confirmed letter of credit. Before that contract had been made the suppliers were required to arrange for a guarantee for 10% of the contract price. This was procured through Barclays with the sum payable to Umma "on demand without proof or conditions", with Umma then issueing a guarantee to the customer. The suppliers gave a counter-guarantee to Barclays irrevocably authorising them to comply with any demands under the guarantee, with payment being conclusive evidence of the Banks' liability so to comply. The customer did not open the correct confirmed letter of credit, and the suppliers maintained that their guarantee had no effect. The suppliers were not in default. The customer claimed payment on Umma on its guarantee; Umma claimed payment from Barclays, who in turn claimed from the suppliers on the counter-guarantee. The suppliers sought to injunct Barclays and Umma from paying on the guarantees. The court referred to the similarities with letters of credit. where the only exception to the rule of no interference would be if the bank knew that the request for payment was made fraudulently, or on forged documents. The same applied to the performance bond: "... these performance guarantees are virtually promissory notes payable on demand".

[74] On demand bonds may expose the solvent contractor innocent of any default to heavy loss at the hands of an irresponsible employer, but where appreciated they conceal an inevitable and substantial adnal expense for employers; I.N. Duncan Wallace, Construction Contracts: Principles and Policies in Tort and Contract, 1986, Ch. 19, Guarantees and Bonds in Construction Contracts.

[75] Cass. Com. 2nd Feb. 1988.

[76] Cass. Toulouse 26th Oct. 1988.

[77] Cass. Com., 10th June. 1986.

documents requiring it.[78] This principle gives rise to the refusal to give any effect to the terms of the underlying contract where they would interfere with the obligations under the guarantee. However it does appear possible to prove that the underlying contract has been completely carried out in order to prevent recovery on the guarantee.[79]

At common law a guarantee is a promise to answer for the debt or default of another, and is ancillary to the underlying obligation so that discharge of the principal obligation discharges the guarantee obligation. In France Article 2071 defines the nature of a surety as one who binds himself to the creditor for the satisfaction of the obligation if the principal debtor does not do so.[80] By Article 2028 recourse against the principal debtor is given where the surety has made payment, and Article 2029 provides that the surety is subrogated to all rights of the creditor against the principal debtor.

At common law, both conduct to the prejudice of a surety and a material alteration in the obligation guaranteed would release a surety from liability. As to conduct: "A surety is undoubtedly and not unjustly the object of some favour both at law and in equity, and ... is not to be prejudiced by any dealings without his consent between the secured creditor and the principal debtor."[81] As to a material alteration an extension of time would release a surety,[82] but not if there was an express provision in the contract under which the contractor was entitled to such, as in the standard terms. To prevent the operation of the common law rule protecting the surety precautionary words are often included, as in the "Example" provided by FIDIC.

Whether the terms constitute a guarantee at law or not depends on the wording which can cause confusion, because the description "guarantee" in a document does not determine that it bears the legal effects of

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78 Com. 24th Apr. 1990, D. 1991, 177, note Morvan.

79 Cass. Com. 21st May 1985.

80 Suretyship, *du cautionnement*, is the subject of Title XIV of the Code Civil. Article 2011: *"Celui qui se rend caution d'une obligation, se sonmet envers le créancier à satisfaire à cette obligation, si le débiteur n'y satisfait pas lui-même."*.

81 Lord Selborne in Re: Sherry (1884) 25 Ch. D. 692 at 703 (C.A.)

82 Rees v Berrington (1795) 2 Ves. Jun. 539; Greenwood v Francis (1899) 1 Q.B. 312 (C.A.).

suretyship.[83] Whatever the description attached the better course is to regard this area as one of looking at an obligation to pay that arises on certain events. The important feature will be whether the undertaking to pay is related to a failure to perform under some other agreement or not.

Where the production of a document is provided for as the event that triggers the obligation to pay the nature of the document may give a certainty that is a fair balance between the parties,[84] but whether the document complies with the requirement has to be tested.[85] This was done in *I.E. Contractors Ltd. v Lloyds Bank plc. and Rafidian Bank* 86 where one counter-guarantee between the banks was for "... any amount you state you are obliged to pay", but the demand was "At beneficiaries demand please credit full amount ... due to shortages not finished yet". This was held not sufficient because, with or without the doctrine of strict compliance, it was not a statement of an obligation to pay.[87] The call on the guarantee has been examined under civil law, and in Belgium it has been decided that it must be the clear manifestation of the will *manifestation claire de volonté* by which the guarantor is required to meet his obligations, and it must be a definite call,[88] and in France the sending of a letter in terms of "*progogez*

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[83] The Edward Owen case, in which the terms performance guarantee and performance bond were both used, illustrates this. One of the suppliers' arguments had been that because the document had been expressed as a guarantee, the bank was under no liability unless there was a principal debtor and some default in his obligations, and that because there was no default on the part of the suppliers the guarantee did not come into effect. This was rejected on the ground that "Although this agreement is expressed to be a guarantee, it is not in truth such a contract. It has much more of the characteristics of a promissory note than the characteristics of a guarantee.", per Geoffrey Lane L.J. at page 172, The full force derived from the words "We confirm our guarantee ... payable on demand without proof or conditions," and there was no dependence on the underlying contract requiring any default before demand.

[84] The ICC Uniform Rules for Contract Guarantees have sought to deal with the problem by requiring the production of a judgment or arbitral award as a condition of the right to payment, ICC Publication No. 325, 1978.

[85] With performance bonds there may be less need for the doctrine of strict compliance as it applies to letters of credit where the documents are required to be in precisely the terms provided for and "... there is no room for documents which are almost the same or which will do just as well.", Equitable Trust Co. of New York v Dawson Partners Ltd. (1927) 27 Lloyds L.Rep. 49 at 52 per Lord Sumner.

[86] I.E. Contractors Ltd. v Lloyds Bank plc. and Rafidian Bank (1990) 2 Lloyds L. Rep. 496.

[87] In the same case however, the undertaking was to pay "... unconditionally, the said amount on demand, being your claim for damages brought about by ... (the contractor) ...". This required more than a mere demand. It had to state that it was a claim for damages brought about by the contractors. The actual demands made had requested withdrawal of the guarantees "In view of the non-discharge by ... of its contractual obligations in making good the deficiencies ...", and, rejecting the requirement of strict compliance, they were regarded as sufficient because in substance even if not expressly they said that what was claimed was damages for breach of contract.

[88] Pres. Trib. comm. Burssels 17th November 1988. Where it was also held that payment was only due on an effective call made before the date of expiry of the guarantee.

ou payez ", extend time or pay, was held not to constitute a firm and unequivocal call bringing the guarantee obligation into play only a request to keep the guarantee in force.[89]

Whilst the 2nd and 3rd Editions of the FIDIC form made provision for the terms of a bond or guarantee to be as approved by the Employer, no form was proposed.[90] The FIDIC 4th Edition[91] refers to "Performance Security" and requires it to be in the form provided, or otherwise as agreed. Part II of the Conditions of Particular Application provides two Example forms. The language of the performance guarantee put forward by FIDIC in its first Example is virtually the same as the model bond put forward in the 4th Edition of the ICE Conditions, and has been the subject of judicial consideration under the common law as to its nature,[92] and there is no doubt that to recover the employer has to prove both the breach of contract and the damages that he has suffered in consequence.[93]

The extent of time for which the surety is to remain liable is critical. At common law, completion or release of the promise guaranteed discharges the surety from further obligations,[94] and on this form, only when it could be said that the contractor had no further obligation either under the contract or for damages for breach of it could the surety's liability come to an end. Defective work from a failure to "... duly perform and observe all the terms ..." might come to light long after completion.

However, while the time for the liability of the surety is co-extensive with that of the contractor under this FIDIC Example the terms of the underlying contract itself identify the extent in time of the validity of the

[89] Cass. Com. 24th Jan. 1989, Article 2039 of the Code Civil recognises the ability to extend the time under a guarantee and provides that such does not discharge the surety.

[90] This was unlike the English ICE conditions which since their inception in 1945 have included a form of bond that reflected standard, archaic, terminology.

[91] Published in 1987.

[92] Tins Industrial v Kono Insurance (1987) 42 B.L.R. 110, Hong Kong Court of Appeal.

[93] Workington Harbour & Dock Board v Trade Indemnity Co. Ltd. (No. 2) (1937) 3 All E. R. 139 (C.A.) and (1938) 2 All E. R. 101 (H.L.).

[94] Lewis v Hoare (1881) 44 L.T. 66 (H.L.).

guarantee.[95] The duration is critical and by virtue of clause 10.2 of the FIDIC conditions the protection of the employer ends just when he needs it most, as with the retention. The vital area seldom catered for is the potential liability for undetected defects that appear subsequent to defects liability period and within the permitted limitation periods.

This provides a restraint in time on a claim, and in this way prevents claims in respect of subsequently emerging defects. The physical return of the security is an important feature for the contractor to secure, but as seen under the French law relating to retentions the release is imposed even in the absence of the return of that bond.[96]

The proviso in the form is an equally important restraint on a call.[97] Not only has there to be default and damages but the employer must have successfully pursued the contractor to an award or agreement before the surety's obligation to meet the damages arose. The terms of the FIDIC contract itself[98] merely provide for notification to the contractor before a claim is made.[99]

The call on the bond is as between employer and the bank. It is a separate contract. The contractor is not party to it. The bank has its interest secured by a counter-indemnity. The sum finds its way into the hands of the employer. The building contract between the employer and the contractor

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[95] FIDIC 4th Ed. Clause 10.2: "Period of Validity of Performance Security
The performance security shall be valid until the Contractor has executed and completed the Works and remedied any defects therein in accordance with the Contract. No claim shall be made against such security after the issue of the Defects Liability Certificate in accordance with Sub-Clause 62.1 and such security shall be returned to the Contractor within 14 days of the issue of the said Defects Liability Certificate."

[96] Law No. 71-584 of 16th Jul. 1971, Article 2.

[97] FIDIC, first Example form, "Provided always that the above obligation of Guarantor to satisfy and discharge the damages sustained by the Employer shall arise only (a) on written notice from both the Employer and the Contractor that the Employer and the Contractor have mutually agreed that the amount of damages concerned is payable to the Employer or (b) on receipt by the Guarantor of a legally certified copy of an award issued in arbitration proceeding carried out in conformity with the terms of the said Contract that the amount of the damages is payable to the Employer."

[98] The FIDIC Conditions for Mechanical and Electrical Works, 3rd Edition, 1988, extended clause 10.3 to prohibit a claim unless one of four conditions is satisfied: (a) breach by the contractor not remedied within 42 days after notice to do so, with the notice required to state the intention to claim, the amount and the breach relied on, or (b) agreement in writing that the amount demanded is payable, or (c) an award in arbitration unpaid within 42 days, or (d) the contractor's liquidation.

[99] FIDIC, clause 10.3: "Claims under Performance Security: Prior to making a claim under the performance security the Employer shall, in every case, notify the Contractor stating the nature of the default in respect of which the claim is to be made.'

will doubtless have an arbitration clause limiting the jurisdiction of the arbitrator to disputes under that building contract. The arbitrator has no jurisdiction under the bond contract. Within any such arbitration on claim and counterclaim the contractor will with broad merit say that the employer has already received the bond money and he wants it back or credit for it. Such circumstances are not fanciful.[100]

References to discounts may not necessarily mean there can be no account for the bond monies between the parties to the principal transaction, but English authority does not deal with any implied contractual obligations to bring the bond monies into account.[101] If the contention that no account is required is correct it might mean for instance that in the event of delay in completing a building, carefully thought out provisions for liquidated damages subject limits would in effect be pointless.[102]

Such problems have two main sources: independence of the bond or guarantee from the underlying contract and the refusal to interfere with the independent obligation to pay.[103] Only established fraud on the part of the beneficiary known to the issuing bank under a typical unconditional

[100] Dr. N.G. Bunni, The FIDIC Form of Contract (1991), refers to an analysis of 40 construction arbitration awards under the I.C.C. rules between 1988 and 1990, which showed conflict over bank guarantees and performance bands in 25% of the cases. In Harbottle (Mercantile) Ltd. v National Westminster Bank Ltd. (1978) Q.B. 146, first demand guarantees were characterised as in effect representing "a discount in favour of the buyers." This view of the discount was echoed in the Edward Owen case in similar terms. Treating it as a discount presupposes no obligation on the employer to bring the sum into account under the building contract. There would be no question of subrogation. Put shortly, the bond monies simply pass into the general assets of an employer in a case where payment has been made. There are strong reasons for objecting to such a result since in effect it represents a windfall. Albeit that with the judicial pronouncements made it may be said that contractors who make such arrangements have themselves given the discount.

[101] Although the Edward Owen decision does contemplate that when an on demand bond is called, for example, by a buyer and paid by a bank the seller may have some rights against the buyer. The contractor may be relieved by the terms of the underlying contract, which, if governed by English law, may be susceptible to an implied term or collateral agreement that the proceeds of the guarantee should be brought into account between himself and the employer. These mechanisms may more readily be arguable where the contract itself has provided for the bond to be arranged and as a security for the performance of that contract as under the FIDIC conditions. Where the opportunity exists the true answer is for the parties not to leave it to the uncertainties of implication, but to make express provision. The FIDIC form provisions as the period of validity of the performance security and notification of default to the contractor make no mention of accounting for the proceeds of a call within the contract.

[102] J. Uff & E. Jones (eds.), International and ICC Arbitration, 1990, Conference Papers, D. Marks, Bonds and Guarantees: Powers of the Tribunal.

[103] Save in the very narrow exceptional cases of established fraud, illegality, and, perhaps, unusual ancillary circumstances such as allegations of misrepresentation by the beneficiary or rights of set-off against the beneficiary. Under English law the courts have referred interchangeably to cases on letters of credit in order to articulate the independence principle and the limiting of injunctions to cases of established fraud.

bond will be regarded as sufficient in English law to justify refusal of payment by a guarantor,[104] and while the plaintiff argued in the *Edward Owen* case that the known lack of default established fraud, the fact of a dispute as to the letter of credit did not render the only event on which the obligation to pay arose, namely the demand, fraudulent. In France the inability to challenge on the basis of reliance on the underlying contract ceases with "*frauds ou d'abus manifestes* ", fraud or manifest abuse.[105] Here though reference may be made to the applicable terms of the underlying contract in order to show such manifest abuse or fraud, since it is precisely to secure the proper execution of that contract for which the guarantee comes into existence. The *Cour de Cassation* was however clear that "only the existence of fraud or manifest abuse gives rise to an obstacle to the carrying into effect of the agreement under first demand guarantees. It is not sufficient that there is a chance that fraud exists".[106] Without such fraud or manifest abuse the demand must be met, and this without any ability in the *juge des référés* to postpone payment by reference to the new Code of Procedure permitting the ordering of protective measures to prevent imminent loss.[107]

The same principles extend to the counter guarantee, which is not only independent of the underlying contract but equally of the first demand guarantee. There is no connection seen between the counter guarantee to the bank and the liability to the beneficiary. This means that unless there is a provision to the contrary, the call on the counter guarantee is not subject to proof that the first guarantee has been properly called by the beneficiary.[108] Nevertheless it does not prevent the court form interpreting the counter guarantee in the light of the first guarantee.[109] However the mechanism of guarantee and counter-guarantee in respect of a first demand guarantee places the obligation to verify the beneficiary's claim in

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[104] United City Merchants (Investments) Ltd. v Royal Bank of Canada, (1983) A.C. 168.

[105] Paris 19th May 1988, Paris 15th Feb. 1989.

[106] *"Seule l'existence d'une fraude ou d'un abus manifestes est susceptible de faire obstacle à l'exécution des engagements à première demande. Il ne suffit pas qu'en risque de fraude existes."*

[107] Article 873: *"... des mesures conservatoirès pour prévenir un dommage imminent "* [protective measures to prevent imminent loss].

[108] Paris, 8th November 1988: D. 1990, somm. 206, obs. Vasseur; Paris 2nd November 1990: D., 1990, somm. 209 obs. Vasseur.

[109] Cass. comm., 3rd April 1990: D. 1990, IR III.

respect of the underlying contract on the guarantor of first demand, and the counter guarantors have to satisfy themselves that such verification has been properly carried out.[110]

The English courts have begun to indicate some limited recognition, still fully to be explored, that some legal protection could be given against unjustified calls in wider contexts than just the limited exceptions of fraud and illegality. The bank's obligation under the bond is independent and absolute and must be seen to be freely enforceable and, equally in the civil law whilst it is necessary for the bank to verify carefully that the terms of the guarantee as to a call are met, the civil law does not require the bank to be satisfied that the beneficiary has a justified call beyond the terms of the guarantee itself.[111] The focus of attention moves to injuncting the "abusing" beneficiary either from calling upon the bond in the first place or from being able improperly to deal with the proceeds once the call has taken place.[112] In France the independence of the first demand guarantee from the underlying contract has been overcome where that contract has stipulated for a guarantee that falls to be reduced as the value of the work that has been executed increases, *garanties glissantes*, sliding guarantees. The underlying contract has to be examined for thhe purpose of valuation although it seems that the courts nevertheless do not regard such provision as removing the independence attaching to the guarantee rather as transforming it into a secondary security.[113]

[110] Cass. com. 10th November 1981, D. 1982 417, note Agnostini. The banker's obligation of checking does not extend to investigation to uncover possible fruad or abuse, but the bank is liable if the fraud or abuse is apparent to an ordinarily prudent and diligent banker.

[111] Pres. Trib. Com. Brussels 26th May 1988.

[112] Clues to this potential approach in England arise from two cases: Intraco Ltd. v Notis Shipping Corp. (The Bhoja Trader) (1981) 2 Lloyd's Rep. 256, and Potton Homes Ltd. v Coleman Contractors (Overseas) Ltd. (1984) 28 B.L.R. 19. The Bhoja Trader recognises that so long as the actual payment by the bank to the beneficiary is not interfered with, then even in the absence of fraud a Mareva injunction may be granted to prevent the proceeds of the bond in the hands of the beneficiary being removed from the English jurisdiction, "It is the natural corollary of the proposition that a letter of credit or bank guarantee is to be treated as cash but that when the bank pays and cash is received by the beneficiary, it should be subject to the same restraints as any other of his cash assets" per Donaldson L.J.. The significance of the Potton Homes case is in dicta of Eveleigh L.J.: "As between buyer and seller the underlying contract cannot be disregarded ... If the seller has lawfully avoided the contract prima facie it seems to me he should be entitled to restrain the buyer from making use of the performance bond. Moreover, in principle I do not think it possible to say that in no circumstances whatsoever, apart from fraud, will the court restrain the buyer. The facts of each case must be considered." Eveleigh L.J. went on to point out that the Edward Owen case was not concerned with the position as between the buyer and the seller, nor did it address the question as to whether there would have been a subsequent obligation on the employer to account to the supplier.

[113] Paris, 14th March 1988: D., 1989, somm 152 obs. Vasseur. Cass. comm., 27th February 1990: D., 1990, somm. 213, obs. Vasseur.

If by reference to its terms a bond is viewed as a means of payment on account of damages for contractual default then in any subsequent claim or dispute the proceeds of the call should have to be taken into account in diminution of the loss claimed by way of damages as monies already provided. As between the employer/beneficiary and the contractor there might well be arguments justifying the re-payment to the contractor of (some of) the proceeds of a call under a bond even in the absence of fraud. This is relevant not only to a court or arbitrator assessing an award of damages after such a call. The right to re-payment if the proceeds were to be paid over may of itself be arguably sufficient to justify injunctive relief to prevent disposal of the proceeds in the hands of the beneficiary, once the bank has paid.

Whilst French courts have looked restrictively at the question of fraud or abuse by the beneficiary when raised in opposition to a call, there have nevertheless been decisions which assist in showing the approach to the question.[114] It is treated as fraud if a beneficiary makes a call for delay in delivery manifestly contrary to the truth and where the call has in reality no other purpose than to secure a reduction of the agreed price.[115] A call was regarded as abusive, if not fraudulent, where made by a purchaser under a supply contract who had decided that he did not want the contract performed and who was regarded as having treated the guarantee as unwarranted when he had done nothing for four years.[116] Similarly it was held to be an abusive call by a building owner who had ceased to give possession of the site without explanation and without advancing any ground of complaint as to the state or quality of the works, and who himself had prevented any provisional *réception*.[117] The French courts require the fraud or abuse to be manifest and so will not appoint an expert to investigate whether calls were fraudulent in nature on the basis that if such investigation is necessary then there exists a doubt, and with that

[114] Dictionnaire Joly, op. cit. Muse à jour 1990-2.

[115] Paris, 18th November 1986 D. 1988 somm. 247, obs. Vasseur, "*Manifesement contraire la véreité*".

[116] Paris, 27th June 1988 D. 1989 somm. 151; Cass. comm. 6th February 1990: D., 1990, somm. 213, obs. Vasseur.

[117] Versaiilles, 1st December 1988 D. 1989, somm. 155, obs. Vasseur.

doubt the abuse cannot be manifest.[118]

The established position of the guarantee, however, assures its increasing use, and in France the prospective legislation as to *la fiducire* is unlikely to impinge on the continued use whether in respect of retentions or otherwise.

A procedural matter which is capable of being dealt with in the underlying contract, is the jurisdiction of arbitrators appointed to deal with disputes which may be the same as or a least connected with those which gave rise to the call on the bond. Ordinarily, such arbitrators will have no jurisdiction over the bond itself since, although given under a requirement contained in the underlying contract, the bond involves contracts between other persons. It is frequently the case, where a bond has been called and paid, that the contractor will ask the arbitral tribunal to consider the validity of the call and to make protective interlocutory orders.[119] The parties may agree in the underlying contract to give the tribunal jurisdiction in relation to the bond monies, for example, by giving power to direct that part or all of the funds should be brought into a designated account.

That these matters require careful advance consideration is clear and without resolution prior to tendering difficulties arise.[120] The FIDIC form does not assist,[121] because the appropriate resolution of the terms of the bond is not satisfactorily left until after the letter of acceptance.[122] The ICC Uniform Rules for Demand Guarantees have the overall intention to

[118] Paris, 13th October 1988 D. 1990 somm. 211, obs. Vasseur.

[119] Craig Park & Paulsson, ICC Arbitration, para. 26.05.

[120] In England, in Arbiter (Investments) Ltd. v Wiltshier (London) Ltd. (1987) where no terms had been agreed the court was willing to infer that the parties had not contemplated an on-demand bond, reported on this point as a note at 14 Construction L.R. 16.

[121] FIDIC, Clause 10.1 Performance Security
"If the Contract requires the Contractor to obtain security for his proper performance of the Contract, he shall obtain and provide to the Employer such security within 28 days after the receipt of the Letter of Acceptance, in the sum stated in the Appendix to Tender. When providing such security to the Employer, the Contractor shall notify the Engineer of so doing. Such security shall be in the form annexed to these Conditions or in such other form as may be agreed between the Employer and the Contractor. The institution providing such security shall be subject to the approval of the Employer. The cost of complying with the requirements of this Clause shall be borne by the Contractor, unless the Contract otherwise provides."

[122] The Notes to the FIDIC Conditions for Electrical and Mechanical Works,3rd Edition, sensibly make it clear that the precise nature of the performance security should be stated in the tender documents.

attempt to recognise the different interests of the parties involved in a guarantee transaction.[123] The introduction identifies their intent to apply to the use of demand guarantees, namely guarantees, bonds, and other payment undertakings under which the duty of the guarantor or issuer to make payment arises on presentation of a written demand and any other documents specified in the guarantee and is not conditional on actual default in the underlying transaction.

[123] ICC Uniform Rules for Demand Guarantees, ICC Publication No. 458, published in April 1992.

1 The Role of Fault

The existence and scope of the requirement of fault in civil law and under common law give rise to substantial difference in their theoretical approach, but less so, it seems, in practical application.[1] The question arises as to the function of fault in a scheme of contractual remedies, and the impact of liabilities that depend on it. At common law the nature of the breach or the action may be categorised by reference to the degree of fault involved,[2] but fault is not necessarily, depending on the category of the tort, a substantive requirement for any liability.[3] Under civil law fault may be discussed in respect of the legal effects of non-performance, particularly as to termination.[4] A link also exists between fault and damages and is found in Article 1147 of the French Code Civil.

At common law the general presumption in an action for breach of contract is that it is "immaterial why the defendant failed to fulfil his obligations and certainly no defence that he had done his best".[5] This should not obscure the analysis of the nature of the obligation under the contract, and whether it is one where the performance required is that of meeting a standard measured against norms of reasonable effort in the particular field. This analysis may be determinative of the nature of the performance required and whether the absence of fault is a necessary part of it, as in an obligation to exercise due care

1 G. H. Treitel, Remedies for Breach of Contract, A Comparative Account.

2 For example an actionable misrepresentation may be innocent or negligent.

3 Mere interference with a right is sufficient to constitute a tort..

4 Considered under Termination.

5 Raineri v Miles (1981) A.C. 1050 at 1086 (H.L.).

and skill.[6]

In France the scope of the requirement for fault in contractual relations depends on the important distinction already seen between the *obligation de moyens* and the *obligation de résultat* where the former, ordinarily affecting professions, is associated with the due exercise of the skill and care of the calling and the latter with bringing about the promised state of affairs. Whilst in respect of building projects the scheme of guarantee responsibilities under the 1978 legislation applies to all those involved in the construction process and overrides the necessity for such analysis as against the employer, the point remains as to the impact of fault between those so involved and third parties. Further, the obligation under the guarantee in respect of latent defects gives rise to liability even in circumstances otherwise amounting to *cause étrangère* because that is where the risk lies under the policy behind the legislation for this category of contract.

The impact of fault in contract is seen from Articles 1137 and 1147. The first provides that the obligation on a party with regard to the preservation of the subject matter of the contract is to take the degree of care expected of a reasonable person, *d'un bon père de famille* .[7] The second, Article 1147, provides for liability for damages for the failure to perform or for delay in performance in all cases save for the intervention of *cause étrangère*, but there is no necessary, or any, coincidence between a failure to take the care of *un bon père de famille* and a *cause étrangère* . A failure to perform to the requisite standard is a failure regardless of whether the defendant was actually capable of attaining that standard, and so is an imposition of an

[6] It has also to be recognised that the language of fault is frequently and specifically incorporated in contract obligations. For example in JCT 1980 liability under the indemnity in clause 20.2 is in respect of "any negligence, breach of statutory duty, omission or default"; determination of employment by the Contractor under clause 28.1may be for suspension of the works for the specified period by reson of architect's instructions "unless caused by some negligence or default of the Contractor". Under ICE 1991 the indemnity by the Contractor under clause 22 (2) is "... except for damage resulting from any act or neglect ... done or committed by the Employer, his servants or agents."

[7] Article 1137: *"L'obligation de veiller à la conservation de la chose, soi que la convention n'ait pour objet que l'utilité de l'une des parties, soit qu'elle ait pour objet leur utilité commune, soumet celui qui en est chargé à y apporter tous les soins d'un bon père de famille. Cette obligation est plus ou moins étendue relativement à certains contrats, dont les effets, à cet égard, sont expliqués sous les titrs qui les concernant."* [The obligation to take care for the preservation of the subject- matter, whether the agreement has as its object the benefit of one of the parties only, or whether it has as its object their mutual benefit, requires the person who is responsible for it to exercise all the care of *un bon père de famille* . The obligation is more or less extensive in relation to certain contracts, whose effects are explained under the titles which concern them.]

objective standard in a contractual performance. Fault will be irrelevant to the action where the defendant is liable on the principle of a vicarious liability or non-delegable duty.[8]

In English law the impact of fault on an analysis of the nature of the obligation can be seen in the context of building contracts from the distinction between the supply of materials under a building contract and the supply of services. In *Young & Marten v McManus Childs* [9] the sub-contractor who supplied roofing tiles that contained a latent defect from their faulty manufacture was liable under an implied term as to merchantable quality which was not excluded by the specifying of those tiles by name by the contractor. The rejected arguments of the sub-contractor were that where a choice is required then it must be exercised with due skill and care with the lack of choice negating the warranty, and that a contract for work and materials differed from a contract of sale, having the quality of a contract for services where the major component is the skill and judgment of the person undertaking it.

The reasoning behind the rejection included that the warranty against defective quality of materials did not depend on whether care or skill could have prevented the trouble or whether there was knowledge of the existence of the defect. Unless the contract terms excluded the warranty of quality the warranty applied, with the chain of contracts assuming importance in order to provide the vehicle for recovery from the manufacturer with whom the ultimate blame lay.[10] Such a supply under a building contract was regarded as

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[8] Mazeaud, Leçons de droit civil, II, 1 no. 485.

[9] Young & Marten Ltd. v McManus Childs Ltd. (1969) 1 A.C. 454. (H.L.). On the point of implication it is to be noted that the selection was only of the type of tile and there was in fact nothing expressed as to the quality. This may be contrasted with the provisions in JCT 1980 where by clause 2.1 the contractor's obligation as to compliance with the Contract Documents includes the Bills of Quantities and continues: "using materials and workmanship of the quality and standards therein specified", and by clause 2.2.2.1 the Contract Bills are to have been prepared in accordance with the 6th Edition of the Standard Method of Measurement published by the Royal institution of Chartered Surveyors and the Building Employers Federation, which requires them to describe the quality of the materials. These express terms as to quality are beyond the obligation in clause 8.1.1 to provide materials "of the kinds and standards described in the Contract Bills".

[10] Lord Pearce at 470. A tortious liablity of the manufacturer was regarded as an unsatisfactory alternative, but the justification for this argument is weakened by the introduction of product liability pursuant to the EC Directive, O.J. 1985 L 210 p. 7, and referred to under Harmonisation. The chain of liability argument also suffers from the ability for it to be broken by a valid exemption clause, or the effects of nomination; as in Gloucestershire County Council v Richardson (1969) A. C. 480.

without distinction from the circumstances of a sale of goods.[11]

Where the supply of services is involved there is specific imposition of the implied term that the supplier will carry out the service with reasonable care and skill.[12] Whether such standard is met involves fault in the sense that the test is against reasonable human endeavour, but the facility to find an obligation to succeed in the successful production of the result exists depending on the nature of the obligation undertaken.[13]

Under civil law the necessity for fault depends not only on the distinction between obligations *de moyen* and *de résultat* but also on the category of contract into which the transaction falls. In French law, a seller of specific goods is not in breach because they suffer from latent defects, but by reason of them he is subject to the guarantee liability, and price reduction.[14] These are available regardless of fault but they do not provide full relief to the injured party in the sense that they do not compensate his consequential loss or loss of bargain. Such compensation is available if the supplier is at fault, for example if he knew of the defect, and in the case of sales by professional sellers to non-professional buyers there is the presumption of such knowledge, whereby the obligation to guard the buyer against loss due to defects, the *obligation de securité* , becomes in reality an *obligation de résultat* .[15] With the regime of the guarantee liability in respect of defects in buildings such limit on the scope of recovery does not exist.

2 The Role of Tort

The limits on the claims for compensation that the law of contract imposes have led to the development of tort to determine when the perpetrator of the

[11] Lord Upjohn at p. 474. This is recognised by the Supply of Goods and Services Act 1982, and, applying to building contracts as it does; the same terms as to quality and fitness are implied by section 4.

[12] Section 13 of the 1982 Act. It was recognised in Young & Marten Ltd. v McManus Childs Ltd., at p. 465, that the fitting of the tiles would be distinct and involve only the obligation to exercise due skill and care.

[13] As in Greaves & Co. (Contractors) Ltd. v Baynhem Meikle & Partners (1975) 1 W.L.R. 1095, (C.A.). in the case of engineers.

[14] Articles 1641 and 1644; considereded under Réception and Payment, Price Reduction.

[15] Mazeaud, Leçons III, 2 no. 993. Durry, P. La nature contractuelle ou délictuelle de la responsabilité. (1972) 7 Rev. Trim. Dr. civ. 779.

harm ought to bear the loss suffered by the victim, but it is important to recall that the guarantee liability in France has the impact of benefitting those subsequent purchasers whose search for a remedy in England was one of the features of the expansion of the scope of claims in tort.[16]

The development of Roman law moved away from the requirement of a deliberate act and a consciousness of doing harm to mere *culpa* , and extended the scope for recovery to damage to persons or property as an indirect consequence of the act, but there was no general principle that everyone is responsible for the harm for which they are to blame for causing. Whether the law of tort under common law consisted of a general principle that it is wrong to cause harm to others, or of specific rules prohibiting certain kinds of harmful activity,[17] the problems of the boundaries remain.[18] Negligence as a tort under common law embodied the omission to fulfil the requisite duty of care which concept was a necessary introduction for expansion of the scope for recovery in a system without a principle that fault carries a liability. The duty of care may be independent of any proven fault, simply representing a factual situation where society wishes to impose a liability, or it may be seen as those circumstances that are taken to represent fault, and coupled with the facets of breach and damage it then became an available mechanism for limiting the scope of the action.[19] Those limits have reflected diverse attitudes towards the allocation of risk for personal injury and damage to property, and without a principle of exclusion of liability for economic harm the duty aspect has been used to keep liability for negligence in check.[20]

The circumstances of the duty of care of a person in business who gives information advice or opinion, apparently based on special skill or knowledge to those who as he knows or should reasonably foresee will act in

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16 B.S. Markesinis, An Expanding Tort Law - The Price of a Rigid Contract Law. (1987) 103 L.Q.R. 354.

17 The debate found in earlier works, as in Pollock, 12th ed., (1923), and Salmond, 2nd ed., (1910).

18 "Acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief", Lord Atkin in Donoghue v Stevenson (1932) A.C. 562 at 580. In this way the law of tort is as much about non- liability as liability, Williams and Hepple, The Foundations of the Law of Tort.

19 Street, The 20th Century Development and Function of the Law of Tort in England. (1965) 14 I.C.L.Q. 862.

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reliance on its soundness,[21] would be well recognised in civil law. While the wrongful issue of a false statement would be taken as *contra bonos mores*, liability is more likely seen as arising under the law of contract on the basis of the relationship created with the third party. The relationship which is regarded as within the scope of the law of contract derives from factors akin to those found in *Hedley Byrne* to give rise to the duty of care.

3 The French Experience

There are five articles in the Code Civil, which have remained virtually unchanged, on which rest almost the whole of the French law of delict. The wide general principle is in Article 1382 "Any act whatsoever of a person which causes damage to another, obliges the person, by whose fault the damage is caused, to make it good",[22] which is amplified[23] in Article 1383 "Everyone is responsible not only for the damage which he has caused by his own act but also for that which he causes by his negligence or imprudence."[24] A close link is created between fault and tortious liability: any fault committed gives rise to this responsibility if damage results. The formulation of a single fundamental principle, instead of an approach based on specific torts derived from the natural lawyers of the seventeenth century,[25] and the work of Domat was influential on the basis of the Code and its exposition of Roman law,[26] as adapted to the thoughts of the time.[27]

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[21] As in Hedley Byrne & Co. v Heller & Partners (1964) A. C. 465.

[22] Article 1382: *"Tout fait quelconque de l'homme, qui cause à autui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer."*

[23] It is a qualification on any limitation of fault which would otherwise arise by reference to a requirement for malice, R. David, English Law and French Law.

[24] Article 1383: *"Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence."*

[25] As in Grotius, De Jure belli ac pacis libri tres (1685); "Let us come now to what is due by the law of nature in consequence of a wrong. By a wrong we here mean every fault, whether of commission or of omission, which is in conflict with what men ought to do, either from their common interrest or by reason of a special quality. From such a fault, if damage has been caused, by the law of nature an obligation arises, namely, that the damage should be made good." (trans. Kelsey).

[26] Domat, Les Loix civiles dans leur ordre naturel (1689). In this Domat used the idea of fault and derived the principle that compensation must be made for want of care as well as for harm intentionally caused.

[27] Pothier had identified *délits* where the conduct comprised *dol ou malignité* as distinct from *quasi-délits* where the harm was caused without a malign motive but by an imprudence that was not to be excused, *sans maligité, mais par une imprudence qui n'est pas excusable*, and from this the Code placed the law of delict in a chapter *Des délits et des quasi- délits* into which parcels the subject is approached.

From such general principle it has been for the courts to develop the substance and limits of claims in tort.[28] The French concept of fault requires comparison with negligence in English law.[29] *Faute* is treated as a failure to observe a behaviour which the defendant should have respected, with *faute délictuelle* characterised by an intent to cause harm and *faute quasi-délictuelle* constituted "by criticisable conduct which a responsible person similarly circumstanced would not have committed".[30] The reasonable man of ordinary prudence is the *homme avisé* , and of particular interest is the control exercised by the facility to find that such person would not have exercised his rights in an unreasonable manner, an *abus d'un droit*, so as to cause even unintended harm. This includes contractual rights as where premature termination prejudices the other party, where it is suggested the application of the express prohibition on the Employer against giving notice of determination "not unreasonably or vexatiously" in JCT 1980[31] provides a comparable English circumstance. It also extends to the breaking off from a relationship short of contract, as in the abandonment of pre-contract negotiations,[32] an *abus du droit de rompre la négociation*.

This view of fault as an abuse of rights illustrates that tortious liability is by reference to the single principle of fault without the need for, or constrictions of, particularised torts.[33] While the doctrine of consideration in English law is a prerequisite to a binding contract and the existence of a duty of care is a prerequisite for tortious liability, French law regards all agreements seriously entered into as legally binding, and all faults as potential sources of tortious liability without the need to resort to either concept. Without that need or a limitation by reference to a duty of care in the circumstances that may result in liability the facility to reflect moral feelings in tortious liability is the greater.

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[28] Illustrated by Professor André Tunc in his graphically titled essay "It is wise not to take the Civil Codes too seriously", in Essays in Memory of Professor F.H. Lawson,1986.

[29] Lawson and Markesinis, Tortious Liability for Unintentional Harm in the Common Law and the Civil Law, 1982.

[30] Mazeaud, Tunc, Traité de droit civile, 380.

[31] JCT 1980, clause 28.1.3.5: "... provided that such notice shall not be given unreasonably or vexatiously".

[32] Considered under Contract and Pre-Contract.

[33] Just as it is a fault to break off negotiations after a reasonable expectation that a contract would be entered into, so it is a fault to build a wall to deprive a neighbour of light. Fault can also be found in the procedural field, as where an action or step in an action is taken for the extraneous purpose of the burden of costs on a party.

There are circumstances where the existence of fault is presumed, and these are exceptions to the requirement for a plaintiff to prove the fault.[34] Vicarious liability is one,[35] as is the liability of a building owner for its dilapidated condition.[36] The industrial, social and economic developments of the late nineteenth century led to the introduction and of development in French law of an independent meaning to the opening words of Article 1384 whereby a person is liable "not only for damage caused by one's own act, but also for that caused by the act of persons for whom one is responsible, or for things under one's care", and not only must no fault be proved to escape liability but positively that the damage was due to *force majeure* .[37]

Damage is an essential element for the court's decision is to make good, *réparer* , the damage suffered. The distinction between kinds of damage, whether physical or economic has not posed the problems faced in English law, and debate has centred on the extent to which moral damage *préjudice moral* is compensated, but importantly, after *dommage* and *faute* the third element for liability is a causal link between the faulty behaviour and the harm suffered, a chain of causation *lien de causalité* . Here the French view is that there is no such link if the harm is traceable to a *cause étrangère* rather than the defendant's conduct. *Force majeure* , fault of the victim and unforeseeable behaviour of a third party may constitute *cause étrangère* , but even if not sufficient for that purpose they may give rise to a reduction of damages. The boundary of the harm is limited to that which is a direct and immediate consequence, *une suite immédiate et directe* , which follows the

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[34] These are to be found in the provisions of Articles 1384 to 1386.

[35] Article 1384: *"On est responsable non seulement du dommage que l.on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répodre, ou des choses que l'on a sous as garde."*

[36] Article 1386: *"Le propriétaire d'un bâtiment est responsable du dommage causé par sa rine, lorsqu'elle est arrivée par une suite du défaut d'entretien ou par le vice de sa construction."*

[37] A clear statement is in the Judgment of the Cour de Cassation in Chemin de fer l'Ouest v Marcault: "The presumption of fault, established by Article 1384 al. 1, on the part of the person who has under his care the inanimate object causing the damage, can be rebutted only by proof of *cas fortuit* , a *force majeure* or a *casue étrangère* that cannot be imputed to him; it is not sufficient to prove that he did not commit any fault or that the cause of this damage has not been determined".

test applicable to the law of contract in Article 1151.[38] Within this there is no fixed criterion for remoteness, and the matter rests with the decisions of the *juges du fond*.

The problems arising out of the modern economic and social order in the balancing of interests and risk appear in both jurisdictions, particularly in the area of economic harm. Where for example a builder has negligently damaged a conduit and interrupted the supply of services the English courts might have utilised the scope of the duty,[39] or the boundary of remoteness,[40] to prevent compensation for economic loss.

The re-establishment in England of the distinction between damage to property and pure economic loss may be a less uncertain line as a formulation of policy, but it is a policy expedient and is unlikely to stem the extent of literature on the subject.[41] The Code Civil however makes no distinction between pure economic loss and the harm, physical or otherwise to property or other things to which the claimant has a right, for under Articles 1382 and 1384 whoever causes *dommage* must make compensation where the manner in which the harm was caused gives rise to liability. The scope for variety in its judicial application is immense. The sovereign power of the *juges du fond* renders intervention to develop a cohesive approach difficult to achieve, and even where there is intervention by the *Cour de Cassation* the nature of the judgments delivered leaves the true grounds for the upholding or rejection of appeals on damages obscure.

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[38] Article 1151: *"Dans le cas même où l'inexécution de la convention résulte du dol du débiteur, les dommages et intérêts ne doivent comprendre à l'égard de la perte éprouvée par le créancier et du gain dont il ét''privé, que ce qui est une suite immédiate et directe de l'inexécution de la convention."*
[Even where the non performance of the agreement results from the wilful behaviour of the *débiteur* , damages are to extend only to that which is a direct and immediate consequence of the non-performance, with regard to the loss incurred by the injured party and to the gain of which he has been deprived.]

[39] Weller & Co. v Foot and Mouth Disease Research Institute (1966) 1 Q.B. 569.

[40] S.C.M. Ltd. v Whittall & Son Ltd. (1971) 1 Q.B. 337; Spartan Steel & Alloys Ltd. v Martin & Co. (1973) Q.B. 27.

[41] The German approach represents a very different starting point, contrasting with the French Code, and utilising the formula of damge to property. In simple terms, the BGB does not permit recovery for pure economic loss. On the example the courts in Germany would provide compensation only if property is damaged or destroyed, in that BGB ¶¶ 823-1 protects ownership against negligent damage and pure economic loss requires the identification of a protective statute or a right to an established and operarive business for its recovery. Lawson and Markesinis, Tortious Liability for Unintentional Harm in the Common Law and the Civil Law.

The formula, however, under which the harm may be compensated (apart from the necessity for it to be an immediate and direct consequence of the defendant's conduct) is that it must be *certain* and not *hypothétique* or *éventuel* . As a particular result, the plaintiff who suffered pure economic loss as a result of a builder's negligence in interrupting the supply of energy was allowed recovery by the *Cour de Cassation* as a *conséquence directe du fait de l'entrepreneur* without reference to any difficulties in the decision or wider debate.[42]

The potential for difficulty is when the damage results from competing causes, or where the damage has been increased by circumstances that could not reasonably be anticipated. As to the latter, French law has a distinction between tort where all damage that is a direct consequence of it must be compensated, and the law of contract where a test of foreseeability exists, but may be discarded where the breach is due to deliberate intent, *dol*. Whether the case can be seen as a contractual or tortious liability is thus of potential importance. A breach of contract is not regarded as a tort in relations governed by contract, but the same event may constitute a tort vis a vis others.[43]

The decennial liability in French law benefits the owner and his successors, so that liability of the contractor in tort as against others will require fault to be shown by way of negligent or intentional act or omission, and responsibility may exist not just because of personal fault but because of vicarious responsibility for another's fault or because the damage was caused by something in one's care. This liability, by Article 2262, extends for a period of 30 years from the date when the cause of action arose and the victim became aware of the damage.

Questions involving fault are not uncommonly raised in claims between contractors and professionals, and particularly where one or other is sued or has been found liable to the owner under the decennial liability. In this field the French courts have it seems developed a feature for the purposes of enabling negligence to be established to which resort is had in construction

[42] Cass. civ. 8th May 1970 Bull 1970 II. 122.

[43] F.H. Lawson, Fault and Contract - a few comparisons. (1979) 49 Tul. L.Rev. 295.

cases. This has been to invoke a breach of a contractual obligation to another as the relevant fault under Article 1382, and it constitutes an exception to the general principle in French law that agreements have effect only between contracting parties and neither damage nor benefit third parties, except third party beneficiaries.[44] The contractor then may assert a breach of the architect's contracted design obligation to the employer as a tortious act towards him. It is not for the contractor to show any intention by the contract between the architect and employer to confer third party beneficiary rights on him, but he must show that the act comprising the particular breach caused him damage, which damage may be a liability under the decennial guarantee.

In this respect fault becomes aligned with breach of contractual obligation.[45] The nature of French judicial decisions does not make it possible to ascertain matters such as the exact terms of the contracts, but the operation of this feature seems clear, and particular results indicate a justifiable comparison with the Civil Liability (Contribution) Act 1978.[46] For example, by the Act, a contractor liable to the employer in respect of damage for breach of his contract has a right to claim contribution where the architect would be liable to the employer under his contract or otherwise. No question arises here as to intent to benefit the contractor under the employer -architect contract, or as to the existence of duties owed between the parties to the contribution proceedings. The party claiming contribution does not have to show that he has suffered damage resulting from the breach, but that the party from whom contribution is claimed could be shown on the same factual basis to have

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[44] Article 1165: *"Les conventions n'ont d'effet qu'entre les parties contractantes; elles ne nuisent point au tiers, et alles ne lui profitent que dans le cas prévu par l'article 1121."* [Agreements have effect only between the contracting parties; they do not give rise to detriment to third parties, nor benefit them save as provided in Article 1121].

[45] V.V. Palmer, Contractual Negligence in the Civil Law. (1975) Tul. L. Rev. 49.

[46] By section 1 (1): "... any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly liable with him or otherwise)".
Section 6(1): "A person is liable in respect of any damage for the purposes of this Act if the person who suffered if (or anyone representing his estate on dependents) is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of tort or otherwise)."

been liable if an action had been brought against him in England[47] by the person who suffered the damage.[48] The extent of contribution recoverable is such as the court may find just and equitable having regard to the extent of the person's responsibility for the damage in question, and may amount to a complete indemnity.[49]

The similarity of result in France is illustrated by the case where an owner claimed against the contractor after large cracks and splits appeared in a building constructed to plans of the owner's architect. The contractor sought to join the architect as third party but was challenged on grounds, including, that as he had no contract with the contractor, he could only be liable to the contractor in tort and then only for an act or omission independent of his contract with the owner, and that none had been alleged. The *Cour de Cassation* affirmed the lower court's decision, which had rejected this argument, in terms which described the nature of a contractor's tort action against an architect:

> "Whereas the decision (of the *juge du fond*) correctly declares that the architect and the contractor, third parties to one another, can, in the carrying out of activities which are separate, but dependent in their final goal, commit torts against the other; equally a claim by the owner for breach of contract against the architect, or against the contractor, can, quite apart from any contractual viewpoint, be characterised as a tort in the relations between the architect and the contractor."[50]

A breach by the architect of his obligation to the owner as to proper design may thus constitute the fault vis a vis the contractor if he suffers damage as the result of the design defect. The basis for this is that the activities of both

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[47] The potential impact of the rights to claim contribution under the 1978 Act may in a European context be considerable, first, by reason of section 6(1) by which references in section 1 to a person's liability in respect of any damages are references to any such liability which has been or could be established in an action brought against him England by an or on behalf of the person who suffered damages, and which continues: "but it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales"; and second by reason of the jurisdiction provisions of Articles 2 to 5 of the 1968 Brussels Convention, as incorporated into English law by the Civil Jurisdiction and Judgments Act 1982..

[48] Section 1 (6). By section 1 (2) the entitlement to claim contribution exists even where the claimaint's liability has ceased since the damage occurred (provided he was liable before he made or was ordered or agreed to make the payment in respect of which contribution is sought); or where the payment is made in bona fide settlement or compromise regardless whether he is a or even was liable in respect of the damage (provided the factual basis of the claim against him could be established).

[49] Section 2 (1) and (2). The principles for assessing this are causation and relative blameworthiness; Baker v Willoughby (1970) A.C. 467 (H.L.) at 490.

[50] Cass. Civ. 1, 24th May 1967.

architect and contractor have a common objective (the achievement of the work) with the performance of their activities being interdependent.

In a further example a contractor, having been held liable in damages to the owner for constructing a residential building without a ventilated space under the floor resulting in excessive humidity, claimed indemnification by the architect to whose plans he had built. The conclusion of the *juge du fond* that the architect was liable in tort to the contractor for the damages was challenged on the ground that the contractor could not base his action on negligence committed by the architect in the performance of his contractual obligations to the owner as this negligence was not separable from that contract. The *Cour de Cassation* rejected the point, holding that the fact that the design error could render the architect liable to the owner in contract did not preclude the contractor from alleging that this breach constituted a fault towards him, and permitted the contractor to recover from the architect the damages he had suffered, representing the damages for which he was liable to the owner. Thus if an architect is entrusted with the duty of supervising and managing work and is specially remunerated for this task then if after the owner claims against the contractor for a building defect, the contractor seeks to join the architect as a third party for having negligently managed and supervised the works, the court will not reject the impact of tortious liability by virtue of the contractor being a third party to the employer-architect contract.[51]

That one builder could recover from another in tort in respect of a breach of a contract with the owner by that other builder appears consistent with this, and offers a means of allowing the one builder, who has previously been held liable to the owner for the whole damage, to recover whether in whole or part from the negligent builder.

The French courts it seems reject the argument that it is improper for a contractor who has produced faulty workmanship to seek contribution for some portion of the damage caused by it from architect or engineer. Upon finding that the woodwork of the buildings which the contractor had built was infested with beetles, an owner sued the contractor, who then joined the

[51] Cass. Civ. 1, 13th July 1961.

architect responsible for the design and supervision of the work. The *juge du fond* , while finding that the architect had not inspected the woodwork prior to installation as he should have done, dismissed the claim against the architect on the grounds that the contractor could not be considered a simple executor of work; that he could not justifiably complain of lack of supervision by the architect, who was not his guardian, and that the architect had not contracted as to any obligation to the contractor. The *Cour de Cassation* annulled this, concluding that, notwithstanding the absence of contractual relations between them, the architect and contractor could be liable to each other in tort even when the tortious event constitutes at the same time the breach of a contractual obligation towards the owner, and that the *juge du fond* should have determined: "whether the architect's default (in neglecting to inspect the woodwork prior to installation) of itself and quite apart from any contractual viewpoint did not constitute a fault towards the contractor entitling him to recover damage ...".[52]

In such cases it is however insufficient to assert merely a general failure by the architect of his contract to supervise. A balcony of a building under construction by a contractor supervised by two architects collapsed with fatal consequences. The collapse occurred because only half the quantity of the steel reinforcement required had been used. The contractor and responsible personnel were held liable for the accident and, at first, successfully sought recovery of half of those damages, with the *juge du fond* holding that the architects had insufficiently supervised the work. The *Cour de Cassation* noted that whilst the accident was due to negligent work by the contractor (not faulty design), the architects had the ability "to exercise over him effective, direct and daily control", but annulled the decision as without legal justification because it had been based merely on the architect's obligation to supervise, without determining in what respect the architects had committed a tortious act towards the contractor.[53] The *Cour d'Appel* dismissed the contractor's claim, affirming it difficult to accept that the persons who had caused the accident could transfer a share of the responsibility resulting from its own fault to the architects simply by invoking a general failure of supervision; and further, even if the architects had committed a fault against

[52] Cass. Civ. 3, 4th June 1973.

[53] Cass. Civ. 7th November 1962.

the contractor, it could not be considered the direct or proximate cause of the damage. For there to be liability each must have contributed to the entire damage but lack of supervision could not itself have caused collapse of the balcony and the damages suffered, whereas the negligence of the contractor was sufficient.[54]

The *Cour de Cassation*, likewise, where an architect and contractors had been held liable *in solidum* to the owner for the repair of defects to a central heating system considered that the architect's duty of supervision "does not oblige him constantly to be on the site nor does it substitute for supervision by the contractor of his own personnel", and as the *juge du fond* had not sought to determine "if the architect's obligation of supervision ... would have been of a kind to prevent the defect", the decision was annulled.[55]

Where negligent construction appears to have been flagrant, it seems that the contractor is relieved of having to prove that the damage it suffered was caused by a specific breach of the architect's contractual obligation to supervise.[56] When only two years after completion of a building a large portion of the ceiling of an apartment in the building collapsed, the *Cour de Cassation* held that fault in carrying out the supervisory and managerial functions could be attributed to the architect.[57] Likewise a contractor sued for having failed to treat timber used in house construction with insecticide, as required by the contract (and the absence of which would have threatened the stability of the building), joined the architect responsible for supervising the work as a third party. The architect challenged the joinder. After determining that the architect was obliged to supervise the work and to verify that the materials employed had been treated and after finding that the architect had "purely and simply turned this matter over" to the contractor, the *Cour de Cassation* rejected the challenge to the joinder.[58] This case is also

[54] Cour d'Appel de Dijon, 22nd December 1964.

[55] Cour de Cass. 3, 25th May 1976.

[56] Or, in practical terms, the circumstances are taken as proof in themselves.

[57] Cass. Civ. 1. 31st July 1961. Similarly, where an architect had totally neglected his obligation of supervision, and serious defects existed, the *Cour de Cassation* affirmed liability without requiring that the damage be shown to result from a specific negligent act, and refused to annul the decision that the architect was responsible for half the damages caused by the contractor after noting that the damages consisted, among other things, in cracks in facade and internal bearing walls and infiltrations of rainwater through the walls and after noting that the architect failed to appear on the site until after the construction work was completed; Cass. Civ. 3eme 22nd May 1973.

[58] Cass. Civ. 3, 31st January 1969.

of interest as, under his contract with the owner, the contractor had expressly assumed "sole responsibility" for the supply and installation of building materials and "sole responsibility for defects" which could result therefrom. These obligations on the contractor were not found by the court to limit the architect's obligation towards the owner (consistent with Aritcle 1165) or to prevent the contractor's tort action against the architect based on an alleged breach of it.

4 Liability *in solidum*

Faced with the frequent difficulty of accurately apportioning damage in construction cases and concerned to ensure compensation of the victim (whether the owner or third parties), the French courts often render judgments holding two or more of the participants in a project liable *in solidum*, that is jointly and severally, to the victim for the damage. Such judgments are ordinarily pronounced in cases where fault of several participants is believed to have contributed to the damage.

For example, a subcontractor of the contractor (who was in liquidation), the architect and the engineer were held liable *in solidum* for 75% of the costs of repair of a defective heating and hot water system (the remaining 25% of the costs being imposed on the owner). The defective heating and hot water system resulted from the absence of a water treatment system. The judgment *in solidum* was said by the court to be justified against each party on the ground that each had committed an act of negligence contributing to the damage: the specialist engineer was found in breach of contract for not warning the owner of the risks of omission of the water treatment system; the architect was found in breach for not having verified that provision for a treatment system was made; and the subcontractor was found liable to the owner in tort for undertaking the installation without warning the owner of the absence of a water treatment system.[59]

In cases where construction defects are held to result, in part, from faulty supervision by an engineer or architect, such engineer or architect may be

[59] Cass. Civ. 3, 25th March 1980.

held liable *in solidum* with those responsible for the faulty execution of the work.[60] Apart from reliance on breach of contract to establish a tortious liability there is an action available directly comparable to English contribution proceedings where one party is made liable *in solidum* with other participants in the project and pays the whole amount of the judgment.

5 Tort claims and contract

What though of the owner? Is it consistent with the invoction of the architect's contract with the owner, when considering claims by the contractor for contribition, that the owner should not be precluded by the fact of the contract between contractor and sub-contractor from claiming in tort directly against the latter, and further that he might rely on the sub-contractor's breaches as constituting fault causing damage?

The traditional principle of French law has been that where parties have a contractual relationship then their remedies lie in contract not tort. Significant litigation took place in France in respect of "contractual" actions between sub-contractors and employers. Debate arose in about 1979 as to whether in circumstances of a chain of contracts particularly in sales of goods the ultimate consumer's action agaisnt a sub-vendor was in contract or tort. The essential divide was between the undesirability of different regimes governing the responsibility of the many parties involved so that the remedy in contract was advocated; and the traditional line that without a contractual relationship the remedy was in tort.

Separate chambers of the *Cour de Cassation* adopted different approaches. Contradictory decisions resulted, creating "open crisis".[61] In full assembly the

[60] Cour d'Appel de Paris, 1, 30th March 1973; Cass. Civ. 3, 29th April 1974.

[61] The point derives from decisions in 1984 on similar facts, namely direct claims by the employer against the manufacturer, for defective roof tiles. The First Chamber on 29th May 1984 adopted the premise that the action was "contractual", while the Third Chamber, on 19th June 1984, resolved that the route had to be in tort. These were the subject of the note of Professor Bénabent in Recueil Dalloz Sirey, 1985, 17, Cahier, 213, who used the phrase "open crisis" but supported the contract route: "... it was justifiable to conclude that the presence of a contractual group (more so if it is a group of simultaneous or successive contracts relating to the same object) justifies unity of actions which are brought within its domain and condemns the use of an action of a delictual nature. Even between the extremes of the chain, it is therefore exclusively in the domain of contract that one assesses the elements of responsibility in the same sense"]

Cour de Cassation in 1986 determined that an employer as sub-purchaser of building materials enjoyed all the rights and actions that belonged to the original purchaser and that his action was contractual and not tortious in respect of non-conformity.[62] The impact of this was apparent in 1988 where the plaintiff had given slides for enlargement into photographs to a company who sub-contracted the job to another who lost them. The plaintiff sued the sub-contractor, and the result, firmly adoping the contractual route and rejecting delictual responsibility, was that the sub-contractor was entitled to the benefit of an exclusion clause in the plaintiff's contract, and certainly the plaintiff's rights would have had additional limitations depending on the sub-contractor's contract.[63] This provides a useful display of the role of contract as to, first, its extent, reflecting the French law approach to contract as a perceived relationship; second, its use as a mechanism that curtails tort actions; and third, its emphasis on those contractual obligations attaching to the parties that may determine or limit responsibility without reference to proof of fault.

One might have thought that such result in 1988 would have ended the ability of the employer to bring proceedings against a sub-contractor in tort. A decision later that year to the contrary was described as an "island of resistance to the phenomenon of contractualisation".[64] The debate continued but may have been laid to rest by the decision of the full assembly of the *Cour de Cassation* delivered in July 1991.[65] The conclusion rested on the provision in Article 1165 that agreements have effect only between the parties to them, and was that "the sub-contractor has no contractual relationship with the employer.", so that it re-established the pre-1979 doctrine of liability in tort. The social impetus that undoubtedly led to the

[62] Recueil Dalloz Sirey, 1986, 24, Cahier, 293. The facts concerned the purchase of material for insulating pipework which caused corrosion. The Cour de Cassation sits in full assembly to resolve conflicts between Chambers and where important questions of principle are involved.

[63] Cass. civ. 1, 8th March 1988; La Semaine Juridique, No. 40, 21070. An earlier decision of the Commercial Chamber of the Cour de Cassation which had derived from the partial sub-contracting of the construction of a ship had resulted in a conclusion that no delictual remedy was available between the owner and the sub-contractor, but without reference to a contractual remedy either existing or providing the grounds for the decision; Recueil Dalloz Sirey, 1987, 36 Cahier, 543. This was adversely noted by Professor Jourdain at 545.

[64] Cass. civ. 3, 22nd June 1988, La Semaine Juridique, No. 40, 21125; where the court refused to follow what by then was the orthodox line. The main contractor was in liquidation and the plaintiff building owners claimed against a sub-contractor carpenter in respect of defects. The action was held to be appropriately in tort, but the plaintiff failed for want of proof of fault. The comment is in the note, again of Professor Jourdain.

[65] Cass. civ. 12th July 1991; the case of Besse.

desire to provide a remedy without the necessity for proof of fault has found its mark in the development of the schemes of product liability and is unlikely to re-emerge in the near future as a force influencing the balance between contractual and tortious actions.

6 Droit administratif

Different rules are applicable where the matter falls within the jurisdiction of the administrative court;[66] and where there is a connection between the fault and public service, *faute de service* , liability of the State is substituted.[67] While tortious liability under the *droit civil* is based on fault the *droit administratif* is seen as taking a wider view with compensation provided in certain circumstances without a wrong having been committed, as where harm is caused resulting from something done for the public benefit,[68] for example accidents resulting from public building works. Fault does however play a part and there is a material distinction between fault that reflects malfunctioning of the public service, *faute de service* , and personal fault, *faute personnelle* , committed by an officer but not linked to his public service which broadly resembles the English distinction between a servant's acts in or beyond the scope of his employment.[69]

From a Law of 1799 a duty to compensate anyone injured as a consequence of public works was imposed on the administation, and in this century the *Conseil d'Etat* has evolved a principle of liability without fault,[70] and based on

[66] The principle which highlights the difference and which is applicable whether in respect of torts or of contract was expressed in the judgment of the *Tribunal de Conflits* in the case of Blanco in 1873: "Considering that the liability which may fall upon the state for damage caused to individuals by the act of persons which it employs in the public service cannot be governed by the principles which are laid down in the Civil Code for relations between one individual and another: that this liability is neither general nor absolute: that it has its own special rules which vary according to the needs of the service and the necessity to reconcile the rights of the state withprivate rights ...", T.C. 8th February 1873.

[67] The general liability attributed to the State by the case of Blanco was applied no less to public authorities as from the case of Feutry, T.C. 29th February 1908.

[68] Brown and Bell, French Administrative Law, 4th ed. 1992. Deriving from the principle of "égalité devant les charges publiques", [equality before public burdens] in Article 13 of the Declaration of the Rights of Man of 1789; R. Errera, The Scope and Meaning of No-fault liability in French Administrative Law, 1986, C.L.P., 171.

[69] The distinction leads to a liability of the authority within the jurisdiction of the administrative courts and to a liability of the officer in the ordinary courts. A combination, *cumul*, has led to the authority being liable to bear the whole damages but with rights to secure appropriate contribution, now through the administrative courts.

[70] Initial steps towards this were in a willingness to presume fault.

risk deriving from the activities of the state which should carry an indemnity if creating loss.[71] This aspect contrasts with the common law approach whereby the fact of the works being done, for example on a highway, merely imposes a duty of care on the authority which if broken results in liability, but if not leaves the burden where it falls.[72]

7 The English Experience

The development and construction of a building is complex, involving many separate entities with their own functions and duties. A plethora of relationships is created although in basic form, the contractual chain runs from the employer to the main contractor, to sub-contractors, suppliers, and separately to contracts with the professionals engaged. There are inherent difficulties in this contractual framework, with loss frequently caused by actions of those beyond its reach. Vicarious liability and indemnity provisions are ordinarily incorporated into building contracts, but for whatever reason a contractual chain is broken the prospect of non-recovery from a party who has caused loss remains, with tort as a possible route to recovery.

The elements of a duty of care, proximity and foreseeability, are inescapably present as between the majority of the legal entities involved in a construction project,[73] but restrictions are placed on the types and extent of loss in respect of which a duty of care may be owed and recovery made.[74] Duties are limited at common law, but they are also limited by contractual arrangements that exist.[75] just as in respect of the sub-contractor in France.

Where, because of the main contractor's liquidation, an employer seeks

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[71] As expressed by Duguit in his Traité de droit constitutionnel, 3rd. ed., 1927-9, 469: " ... the activity of the state is carried on in the interest of the entire community; the burdens that it entails should not weigh more heavily on some than on others. If then state action results in individual damage to particular citizens, the state should make redress, whether there be a fault committed by the public officers concerned. The state is, in some ways an insurer of what is often called social risk, *risque social* ...".

[72] The example is illustrated by Holliday v National Telephone Company (1899) 2 Q.B. 392.

[73] Murphy v Brentwood District Council (1991) 1 A.C. 398 (H.L.) at 462-3.

[74] Murphy at p. 471-2.

[75] Simaan General Contracting Co. v Pilkington Glass Ltd (No.2) (1988) Q.B. 758 (C.A.).

recovery from a sub-contractor for the latter's defaults which have caused loss,[76] proximity and foreseeability are present for a prima facie duty of care to arise, but the hurdle is the ability to recover economic loss.[77] The current law relating to the recovery of economic loss in negligence has been developed entirely by the judiciary. This has laid its basis open to constant revision to reflect perceived changing social and economic conditions and varying policy considerations, and such propensity has been particularly apparent in recent times during which the courts have followed caution, restricting negligence outside contract and emphasising the pre-eminence of parties' own contractual framework in risk allocation.[78] As a result, many of the expansions in the law manifest in the previous decades have been overturned.

The foundation for the development of negligence was the duty of care, but it did not derive from or portray a principle in the sense of Article 1382 of the Code Civil, for it carried the seeds of lack of one. Lord Atkin in *Donoghue v Stevenson* [79] relied on the consideration in *Le Lievre v Gould* [80] that it had been established that:

> "under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other or may injure his property."[81]

[76] As was done in Junior Books Ltd. v Veitchi Co. Ltd. (1983) 1 A.C. 520 (H.L.), but there was nothing to indicate in that case that the main contractor was in liquidation or that the contractual chain was not available.

[77] The cost of repair or replacement, diminution in value, and loss of profit.

[78] B.S. Markesinis, The Random Element of their Lordships' Infallible Judgment: A Economic and Comparative Analysis of the Tort of Negligence from Anns to Murphy. (1992) 55 M.L.R. 619.

[79] (1932) AC 562 at 580: "At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. ... The rule that you are to love your neighbour becomes in law, you must not injure your neighbour, and the lawyer's question, Who is my neighbour? receives a restrictive reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

[80] Le Lievre v Gould (1893) 1 Q.B. 491. In the same case, per A.L. Smith L.J.: "The decision of Heaven v Pender [(1882-3) 11 Q.B.D. 503] was founded upon the principle, that a duty to take care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other."

[81] This, by Lord Atkin, "Sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act. ... I confine myself to articles of common household use, where every one, including the manufacturer, knows that the articles will be used by other persons than the actual ultimate purchaser ..." (1932) AC 562 at 583.

but lack of a principle is illustrated in the dissent in *Donoghue v. Stevenson* ,[82] which was prophetic of later difficulties.[83] Despite this Lord Atkin's general conception of relations which give rise to a duty of care was taken as a "principle of proximity"[84] and to be regarded as a statement of principle although requiring qualification.[85]

Notwithstanding debate over the extent of a principle, recovery in *Donoghue v Stevenson* extended only to the injury caused to a person, a separate entity, by the offending article. The cost of or damage to the offending article itself was not recovered and the liability of the manufacturer depended largely on the absence of opportunity for intermediate inspection by the user. It was seen as a short step from it to conclude that a negligent misrepresentation may give rise to an action for damages for financial loss, since the law will imply a duty of care when a party seeking information from a party possessed of special skill trusts him to exercise due care, and that party knew or ought to have known that reliance was being placed on his skill and judgment.[86]

The conclusions in *Hedley Byrne* [87] were that there must be something more than mere misstatement, the most natural requirement being that expressly or by implication from the circumstances the speaker or writer has undertaken some responsibility. If a person assumes a responsibility to tender deliberate advice, liability would attach if given negligently, and it was

[82] "If one step, why not fifty. Yet if a house be, as it sometimes is, negligently built, and in consequence of that negligence the ceiling falls and injures the occupier or anyone else, no action against the builder exists according to English law, although I believe such a right did exist according to the laws of Babylon.", (1932) AC 562 at 577. Lord Buckmaster thought that Heaven v Pender should be buried so securely that their perturbed spirits should no longer vex the law. He continued "... it would seem little short of outrageous to make them responsible to members of the public for the condition of the contents of every bottle which issues from their works. It is obvious that, if such responsibility attached to the defenders, they might be called on to meet claims of damages which they could not possibly investigate or answer."

[83] In D. & F. Estates v Church Commissioners (1989) A.C. 177 (H.L).

[84] Lord Devlin in Hedley Byrne & Co. Ltd v Heller & Partners Ltd. (1964) A.C. 465 at 524.

[85] "It will require qualification in new circumstances. But ... it ought to apply unless there is some justification or valid explanation for its exclusion. For example, causing economic loss is a different matter, for one thing, it is often caused by deliberate action." Lord Reid in Dorset Yacht Co. Ltd. v Home Office (1970) A.C. 1004 (H.L.) at 1026.

[86] Hedley Byrne & Co. Ltd. v Heller and Partners Ltd. (1964) A.C. 465 (H.L.).

[87] The facts should not be overlooked. Advertising agents placed orders for which they were liable to pay. They asked their bankers to inquire into the financial stability of their client company. The bankers made inquiries of the Respondents, who gave favourable references "without responsibility". In reliance on the references, the Appellants placed orders which resulted in loss. The disclaimer negated the duty.

postulated that situations might exist where "... one person voluntarily and gratuitously undertakes to do something for another and becomes under a duty to exercise reasonable care."[88] Such assumption of responsibility has emerged as the kernel of the case,[89] but Lord Devlin was content "with the proposition that wherever there is a relationship equivalent to contract there is a duty of care."[90] This provided a basis for holding that if there is an actual contract, there is no duty of care.[91] The elements in *Donoghue v Stevenson* of physical injury to person or property and the exclusion of economic loss enunciated in the *Dorset Yacht* case were omitted,[92] but *Hedley Byrne* has constituted a special and limited exception which in turn has been built on in relation to liability of advisers.[93] It has survived the counter-revolution and is used as a platform for explanation and justification.

Since 1970 a spate of cases in this area have substantially derived from building works.[94] *Dutton v Bognor Regis U.D.C.* [95] imposed liability for damages not limited to physical injury but extending to damage to the house and an indication, deriving from *Hedley Byrne* , that such might include economic loss.[96] In reaching this conclusion the premise was that a builder

[88] Lord Morris at page 497.

[89] Emphasis was also placed on reliance, and on foreseeability of loss. Per Lord Morris at page 496: "In logic I can see no essential reasons for distinguishing injury which is caused by a reliance upon words from injury which is caused by a reliance upon the safety of the staging of a ship ..[Heaven v Pender] or by reliance upon the safety for use of the contents of a bottle of hair wash [George v Skivington (1869) L.R. 5 Ex.1] or a bottle of some consumable liquid [Donoghue v Stevenson." Per Lord Devlin at page 517: "That is why the distinction is now said to depend on whether financial loss is caused through physical injury or whether it is caused directly. The interposition of the physical injury is said to make a difference of principle. I can find neither logic nor common sense in this."

[90] At page 530.

[91] Greater Nottingham Co-operative Society Ltd. v Cementation Piling and Foundations Ltd. (1988) 3 W.L.R. 396 (C.A.).

[92] The telescoping of the neighbour principle of reasonable foresight with economic loss recoverability under Hedley Byrne was identified as giving rise to an unacceptable expansion of liability and a requirement for some other test for economic loss claims, P.P. Craig (1976) 92 L.Q.R. 213.

[93] Caparo Industries Plc. v Dickman (1990) 2 A.C. 605.

[94] Reviewed initially by I.N.Duncan Wallace (1977) 93 L.Q.R. 16, and also by reference to Commonwealth developments (1978) 94 L.Q.R. 60, and 331.

[95] Dutton v Bognor Regis U.D.C. (1972) 1 Q.B. 373 (C.A.). A claim by a subsequent purchaser against a Local Authority for negligence in inspecting foundations built on the site of a rubbish tip. The builder was not an active party as it was thought that as the law then stood a claim against the builder could not succeed. The Court of Appeal held that the power of inspection under the Public Health Act 1936 carried with a duty at common law to take reasonable care to see that the byelaws were complied with and that negligent approval of foundations, which resulted in a hidden defect likely to cause injury to a future purchaser, was a breach of that duty. The plaintiff came within the class of persons described in Donoghue v Stevenson. There was sufficient proximity and, with buildings there was no need to show reliance.

[96] Stamp L.J. at page 415: "... one goes back to consider what was the character of the duty, if any, owed to the plaintiff, and one finds on authority that the injury which is one of the essential elements of the tort of negligence is not confined to physical damage to personal property but may embrace economic damage which the plaintiff suffers buying a worthless thing, as is shown by [Hedley Byrne]."

could be liable for negligence in constructing a house, and this proved the start of a pendulum swing from the then prevailing view to the position in *Junior Books v Veitchi,*[97] and back, when *Murphy* overruled *Dutton*.[98]

Also overruled in *Murphy*, was *Anns v Merton*[99] which was a further, and ultimate, extension of Lord Atkin's neighbour principle. Prior to the decision, economic loss in tort was recoverable, resulting from negligent acts or omissions, so far as it was immediately consequent on physical damage,[100] or from negligent misstatements, so far as the *Hedley Byrne* special relationship and assumption of responsibility tests were satisfied. Following the decision in *Anns* both the test for determining the existence of a duty of care (for acts and omissions as well as statements) and for recovery of economic loss was taken as Lord Wilberforce's two stage test: firstly whether:

> "as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of persons to whom it is owed or the damages to which a breach of it may give rise. ... [e.g.] cases about "economic loss" where, a duty having been held to exist, the nature of the recoverable damages was limited."[101]

Lord Wilberforce agreed generally with the conclusions in *Dutton* as to the position of the builder stating that the "nature of the damages recoverable ... may also include damage to the dwelling house itself ...".[102]

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97 Junior Books Ltd. v Veitchi Co. Ltd. (1983) 1 A.C. 520.

98 D.& F Estates cast doubt on Dutton, and it was expressly overruled by the House of Lords in Murphy v Brentwood District Council.

99 Anns v Merton London Borough Council (1978) A.C. 728 (H.L.).

100 Spartan Steel & Alloys Ltd. v Martin & Co. Contractors Ltd. (1973) 1 Q.B. 373, (CA).; although Dutton v Bognor Regis had made some inroads into this.

101 At p. 751. Anns was a claim by lessees of flats against a Local Authority for negligence in relation to their powers of inspection under Building Byelaws in allowing builders to construct insufficient foundations causing structural movement resulting in cracks and sloping floors. Applying this test, it was held on assumed facts that the Local Authority were liable.

102 There was discussion as to the nature and purpose of parts of the Public Health Acts from which it was concluded that a Building Inspector owed a duty of care of occupiers, being persons whose health or safety might suffer injury if the foundations were inadequate, and arising from this it was held that the cause of action only arose when there was present or imminent danger to the health or safety of persons occupying the building. The relevant damage was "... in my opinion material, physical damage and what is recoverable is the amount of expenditure necessary to restore the dwelling to a condition in which it is no longer a danger to the health or safety of persons occupying ..." at page 759.

Anns gave rise to notable features. First, the two stage test was said to be of general application and to be derived from *Donoghue v Stevenson*. Second, *Dutton* was affirmed, including the proposition that a builder may be liable for negligence in constructing a house. Third, an emphasis was placed on the present or imminent danger to health or public safety, although injury need not have been suffered, (this derived from the purpose of the Public Health Acts, but it is very closely allied to the principle of physical damage). Fourth, the nature of the damage recoverable was said to encompass reasonable expenses of necessary alternative accommodation as well as repair costs, namely economic loss.

Anns enjoyed prominence but even before its demise in Murphy, it attracted increasing criticism and doubt.[103] It was to be treated with reservation,[104] and a preference was expressed that the law should develop new categories of negligence incrementally rather than by a massive extension restrained only by the *Anns* second stage.[105] The second stage of the *Anns* test would rarely have to be applied, and *Hedley Byrne* and *Junior Books* "turned on the voluntary assumption of responsibility towards a particular party, giving rise to a special relationship."[106]

Prior to this, the freedom given by the *Anns* test had been illustrated in

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[103] Yuen Kun Yeu v Attorney-General of Hong Kong (1987) 3 W.L.R. 776 (P.C.). This case concerned a claim against the Hong Kong Commissioner of Deposit Taking companies for negligence in the registration of a company whose affairs, it was said, he should have known were being conducted fraudulently, speculatively and to the detriment of its customers. The Privy Council held that there was no cause of action since the relationship between the Commissioner and the plaintiffs was insufficiently close and direct for him to owe them, as members of an unascertained class of potential depositors, a duty to take reasonable care. In reaching this conclusion it was said, at page 785, that: "For the future it should be recognised that the two-stage test in (Anns) is not to be regarded in all circumstances as a suitable guide to the existence of duty of care."

[104] Lord Keith at page 783: "Their Lordships venture to think that the two stage test formulated by Lord Wilberforce ... has been elevated to a degree of importance greater than its merits. Further, the expression of the first stage of the test carries with it a risk of misinterpretation. ... The first view ... is that he meant to test the sufficiency of proximity simply by the reasonable contemplation of likely harm. The second view ... is that Lord Wilberforce meant the expression "proximity or neighbourhood" to be a composite one, importing the whole concept of necessary relationship between plaintiff and defendant described by Lord Atkin in (Donoghue v Stevenson). In their Lordship's opinion the second view is the correct one."

[105] From Brennan J. in the Australian case of Council of the Shire of Sutherland v Heyman (1985) 59 ALJR 564. The case offered sensible guidelines for the future, I.N Duncan Wallace, I.C.L.R., vol.3, 1986.

[106] Lord Keith at pages 785 and 787.

Junior Books[107] where: there was no danger to life or limb or other property; limiting *Donoghue v Stevenson* to physical damage to person or property was regarded as long since ceased; there was "... almost as close a commercial relationship with the respondents as it is possible to envisage short of privity of contract"; there was no physical damage to the flooring in the sense in which that phrase was used in *Dutton* ; the question was whether the duty extended to avoid defects in the work itself; sometimes it had been overlooked that virtually all damage including physical damage is in one sense financial or economic for it is compensated by an award of damages.[108] Exclusion clauses in the main contract were pointed to as possible facts limiting the duty of care, but there was a duty to take reasonable care to avoid not only physical damage to person or property but also pure economic loss.[109] Dissent pointed out that *Donoghue v Stevenson* was based on danger of physical injury to persons or property other than the very property which gave rise to the danger,[110] but it appeared that there was nothing more to hold back economic loss claims and that contract was an unnecessary

[107] Junior Books Ltd. v Veitchi Co. Ltd (1983) 1 A.C. 520 (H.L.). Specialist flooring sub-contractors laid a floor at the pursuers factory within the pursuers alleged was negligently defective. They claimed the cost of relaying the floor and various items of economic and financial loss consequential on replacement. They did not allege that there was any danger of injury to people or property. It was held that where the relationship was sufficiently close a duty in tort extended to avoid causing pure economic loss consequential on defects in the work.

[108] Lord Roskill between pages 538 and 545.

[109] Lord Keith at page 535; "It has also been established that where a duty of care exists through the presence of such reasonable anticipation (of physical injury to person or property), and it is breached, then even though no such injury has actually been caused because the person to whom the duty is owed has incurred expenditure in averting the danger, that person in entitled to damages measured by the amount of that expenditure." The deterioration of the flooring was not damage to the respondent's property such as to give rise to a liability falling directly within Donoghue v Stevenson. The flooring had an inherent defect. The appellants did not damage the respondent's property: they supplied them with a defective floor.

[110] The apparent effect of Junior Books as an unwarranted intrusion of tort into what should be the field of contract was seriously doubted by observers who found support in Lord Brandon's dissent, including Professor J. Fleming (1984) Oxford Journal of Legal Studies, vol. 4, No. 2.

impediment to recovery.[111]

The scope of the duty of care was used to herald a retreat from tort in the *Peabody* case,[112] but it was *Simaan v Pilkington* [113] which tackled the problem of economic loss. Main contractors sued glass suppliers in negligence for supplying glass units which were not of the colour specified and claimed economic loss because money which otherwise they would have been paid was withheld. It was held that a claim for pure economic loss, unaccompanied by physical damage to property of which the plaintiff was owner or to which he could show possessory title, lay only where there was a special relationship which amounted to reliance by the plaintiff on the defendant. The plaintiffs had no proprietary interest. It was doubted whether there was any damage. Nor had the defendants assumed responsibility to the plaintiffs for the quality of the units.

The conclusions included an acceptance without reservation that a claim may lie in negligence for economic loss alone (*Hedley Byrne*); that the defendants owed the plaintiffs a conventional duty of care to avoid physical damage to persons or property; that there was no meaningful sense in which the plaintiffs could be said to have relied on the defendants; that it might be

[111] "Plainly this decision contained the seeds of a major development of the law of negligence. .... It remained to be seen whether those seeds would be encouraged or permitted to germinate.", per Bingham L.J. in Simaan General Contracting Co. v Pilkington Glass Ltd (No.2) (1988) Q.B. 758 at 768. Junior Books was analysed to great effect in Muirhead v Industrial Tank Specialists Ltd. (1986) Q.B. 507, to show that it contained no principle at all, per Goff L.J. at 523f, " ... the only principle ... consistent with (1) the relevance of "the very close proximity between the parties"; (2) the relevance of reliance by the plaintiff on the defendant; and (3) the fact that the defendant may be able to rely on contractual terms with a third party in order to defeat the Plaintiff's claim against him, is that, on the facts ... it was considered by the majority ... that the nominated subcontractor had assumed a direct responsibility to the building owner. . However ... the parties had deliberately structured their contractual relationship in order to achieve the results that (apart from any special arrangements) there should be no direct liability inter se." It was regarded as an "exception to the general principle that economic loss is not recoverable in the absence of actual or apprehended physical damage", per Woolf L.J. in Greater Nottingham at page 419, and uncitable, per Dillon L.J. in Simaan v Pilkington at page 778: a "*controversial decision .... [which] cannot now be regarded as a useful* pointer to any development of the law ... ." In Murphy, the House of Lords said that Junior Books could be regarded as an application of Hedley Byrne.

[112] Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co. Ltd. (1985) 1 A.C. 210 (H.L.). Plans submitted to the local authority for approval showed flexible drainage. The drains in fact constructed were, on the instructions of the Plaintiffs' architect, rigid. This was known to the local authority drainage inspector. When the drains were tested two years later they were unsatisfactory and had to be reconstructed. The House of Lords held that the Plaintiffs' claim in negligence against the local authority failed because (i) it was not "just and reasonable" to impose liability and (ii) the local authority owed no duty to activate their statutory powers in relation to drainage. The issue really came to be whether the local authority owed a duty to Peabody to warn then that they were heading for financial disaster. Considered as "refreshingly clear" in I.N. Duncan Wallace, The New Peabody Principle. (1985) 1 Constr. L.J. 176.

[113] Simaan General Contracting Co. v Pilkington Glass Ltd (No.2) (1988) Q.B. 758.

possible to say that a nominated subcontractor has assumed responsibility to the building owner, but not to the main contractor, that *Junior Books* had been interpreted as a case of physical damage and that it was an abuse of language to describe the glass units as damaged; that *Hedley Byrne* did not establish a general rule that claims in negligence may succeed on proof of foreseeable economic loss caused by the defendant even where no damage to property and no proprietary or possessory interest are shown; and finally that it was not just or reasonable to impose a duty of care on the defendants towards the plaintiffs of the scope contended for. The approach of the law to awarding damages for economic loss was affected by pragmatic considerations.

D. & F. Estates [114] included a re-analysis of *Anns* . The case concerned defective work by plastering subcontractors. The non-occupying corporate owner claimed against the main contractor ceiling repair costs, future repair costs of other plasterwork said to be defective and loss of rent. The Court of Appeal had held that a building contractor does not owe a duty of care to an owner or lessee not in occupation;) the contractor did not owe a duty of care to supervise the subcontractor; and, even if there had been a duty, damages would not include loss of rent being purely economic loss. The House of Lords returned to the dissent in Junior Books, as expressing principles:

> "... easy enough to comprehend and probably not difficult to apply when the defect complained of is in a chattel supplied complete by a single manufacturer. If the hidden defect in the chattel is the cause of personal injury or of damage to property other then the chattel itself, the manufacturer is liable. But if the hidden defect is discovered before any such damage is caused, there is no longer any room for the application of the Donoghue v Stevenson principle. The chattel is now defective in quality, but is no longer dangerous. It may be valueless or it may be capable of economic repair. In either case the economic loss is recoverable in contract by a buyer or hirer of the chattel entitled to the benefit of a relevant warranty of quality, but is not recoverable in tort by a remote buyer or hirer of the chattel.
>
> If the same principle applies in the field of real property to the liability of a builder of a permanent structure which is dangerously defective, that liability can only arise if the defect remains hidden until the defective structure causes personal injury or damage to property other than the structure itself. If the defect is discovered before any damage is done, the loss sustained by the owner of the structure, who has to

[114] D. & F. Estates v Church Commissioners (1989) A.C. 177 (HL).

repair or demolish it to avoid a potential source of danger to third parties, would seem to be purely economic."[115]

It was not there necessary to decide how far *Anns* departed from this principle, but the inference was that it was wrong,[116] as confirmed in *Murphy*. The notion of complex structures was introduced, where one element of the structure should be treated for the purpose of the application of the principles as distinct from another element, so that damage to one part of the structure caused by a hidden defect in another part may qualify to be treated as damage to other property.[117] Liability of the builder in negligence for the cost of replacing the defect could not follow from *Donoghue v Stevenson* or any legitimate development of it, and "would be to impose upon him for the benefit of those with whom he had no contractual relationship the obligation of one who warranted the quality of the plaster as regards materials workmanship and fitness for purpose."[118]

D. & F. Estates was of profound significance, and put the law back to pre-1970.[119] It supported the following propositions: first that a claim in negligence will not normally succeed unless there has been physical damage to persons or property other than the property which is the product of the negligence. Other claims are categorised as claims for pure economic loss and irrecoverable or warranty claims only recoverable in contract. Second, that once a potentially dangerous hidden defect is discovered, it ceases to be dangerous (since the means of averting the danger is available) and there is

[115] Lord Bridge at page 206.

[116] I.N. Duncan Wallace, Anns Beyond Repair. (1991) 107 L.Q.R. 107. J. Stapleton, Duty of Care and Economic loss. (1991 107 L.Q.R. 249.

[117] "The builder of a house or other structure is liable at common law for negligence only where actual damage, either to person or to property, results [from] carelessness on his part in the course of construction. That the liability should embrace damage to the defective article itself is, of course, an anomaly which distinguishes it from liability for the manufacture of a defective chattel but it can, I think, be accounted for on the basis ... that, in the case of a complex structure such as building, individual parts of the building fall to be treated as separate and distinct items of property. On that footing, damage caused to other parts of the building from, for instance, defective foundations or defective steelwork would ground an action but not damage to the defective part itself except in so far as that part caused other damage, when the damages would include the cost of repair to that part so far as necessary to remedy damage caused to other parts.", Lord Oliver at page 214.

[118] Lord Bridge at page 207. This was just what Parliament had done in the Defective Premises Act 1972 in respect of dwellings, but not for commercial premises, and this is the effect of the guarantee obligation under French law. This was also the effect in the St. Martins case, reported with Linden Gardens Trust v Lenesta Sludge Disposals Ltd. (1993) 3 W.L.R. 408 (H.L.). Interestingly, Keating on Building Contracts, 5th ed., considers study of the Act more suitable to a work on torts.

[119] Sir Robin Cooke, An Impossible Distinction. (1991) 107 L.Q.R. 46.

no claim in negligence, but there may be recovery of the cost of averting a danger to the health and safety of occupants or third parties, and, on one view, liability depended on the chance of an accident occurring before the defect is discovered. Third, that *Junior Books* was wrongly decided. Fourth, where *Anns* departed from the principle above it was wrong and *Dutton* might be wrong.[120]

By what criteria were the courts to treat one part of the structure as distinct from another? Possibilities might include functional interdependence, structural dependence, or sourcing of the different elements from different designers or suppliers.[121] It was observed in Murphy that it would be unrealistic to take the view that damage to one part caused by a hidden defect in another part might qualify as damage to other property as regards a building the whole of which had been erected and equipped by the same contractor. In that situation the whole package provided by the contractor would fall to be regarded as one unit rendered unsound by a defect in a part; but, where for example electric wiring had been installed by a subcontractor and due to a careless defect a fire destroyed the building, "it might not be stretching ordinary principles too far to hold the electrical sub-contractor liable for the damage".

A distinction had to be drawn between some part of a complex structure which was a danger only because it did not perform its proper function in sustaining the other parts, and some distinct item incorporated in the structure which malfunctioned so as to inflict positive damage on the structure in which it was incorporated. So, if a defective central heating boiler exploded and damaged a house or a defective electrical installation malfunctioned and set the house on fire, there was no reason to doubt that the owner, if he could prove that the damage was due to the negligence of the boiler manufacturer or the electrical contractor, could recover damages in tort. But the position was entirely different where, by reason of the inadequacy of the foundations to support the superstructure, differential

[120] Anns had introduced "an entirely novel concept" and Lord Wilberforce's observations in Anns were "difficult to reconcile with any conventional analysis of the underlying basis of liability in tort for negligence." Inevitably there was considerable uncertainty after D & F Estates which has been removed by Murphy.

[121] I.N. Duncan Wallace, Negligence and Defective Buildings: Confusion Confounded. (1989) 105 L.Q.R. 46.

settlement and consequent cracking occurred. Here, once the first cracks appeared, the structure as a whole was seen to be defective and the nature of the defect was known.[122]

The open crisis (as the phrase had been applied to the debate in French law) was laid to rest in *Murphy* where it was acknowledged that the complex structure theory had been rightly criticised; it having been advanced as the only logically possible explanation of the categorisation of the damage in *Anns* as "material, physical damage". Its artificiality was demonstrated and it was rejected as a viable explanation of the basis for decision in *Anns*. Prior to *Murphy* uncertainties and dilemmas presented by *D. & F. Estates* were apparent in decisions at first instance.[123] The current position regarding the recovery of losses at common law in the tort of negligence, appears to be that to establish a claim in negligence, a plaintiff must show a duty of care owed,[124] and a breach of that duty causing actionable damage; the definition of the circumstances in which a defendant owes a duty of care is critically related to the definition of what is actionable damage; the damage necessary to sustain a claim in negligence must be actual physical injury to person or property, other than property which is the product of the negligence itself.[125]

In the context of a building, where a whole building is erected and equipped by the same contractor, then the building is ordinarily to be regarded as one unit. If in such a building defective foundations, for instance, damage the superstructure, that will not be physical damage to other property sufficient

[122] Even if, contrary to this view, the initial damage could be regarded as damage to other property caused by a latent defect, once the defect was known the situation of the building owner was analogous to that of the car owner who discovered that the car had faulty brakes. He might have a house which, until repairs were effected, was unfit for habitation, but, subject to the reservation expressed above with respect to ruinous buildings at or near the boundary of the owner's property, the building no longer represented a source of danger and as it deteriorated would only damage itself.

[123] West Kent Cold Storage Co. Ltd. v C Hemmings & Co Ltd. (1990) C.I.L.L. 547. Portsea Island Mutual Co-Operative Society Ltd. v Michael Brashier Associates (1989) C.I.L.L. 520.

[124] "In most claims in respect of physical damage to property the question of the existence of a duty of care does not give rise to any problem because it is self-evident that such a duty exists and the contrary view is unarguable", Lord Brandon in Mobil Oil Hong Kong v Hong Kong United Dockyards (1991) 1 Lloyds Rep. 309 at 328 (P.C.).

[125] A requirement for liability in negligence following Donoghue v Stevenson is no reasonable opportunity for intermediate examination which would have enabled the plaintiff to be aware of the potential for harm before it occurred. So, does discovery of a defect before it causes injury to person or other property prevent recovery of the costs of making good the defect? On that basis the costs of averting danger would be recoverable only in where recoverable because there is exceptional liability for reliance on negligent advice or information (Hedley Byrne); or, where the costs are inevitable to prevent imminent harm to neighbouring property.

to found a claim against the contractor in negligence. (In any event, once the first cracks are detected, the loss is considered to be purely economic and irrecoverable). However, if some distinct item incorporated in the structure malfunctions so as to inflict damage on the structure in which it is incorporated, there may be liability in tort. If defective electrical wiring installed by a sub-contractor causes a fire which damages the building or if a central heating boiler explodes, the electrical sub-contractor or the boiler manufacturer may be liable for damages. There is thus an essential difference between a defect which causes damage, externally, and a defect in quality, and a contractor will ordinarily have no liability under the tort of negligence on account of the mere fact of a defect, and this would apply equally as between employer and sub-contractor.

As to recoverability, a plaintiff claiming in negligence normally cannot recover economic loss (being "pure" if it is unrelated to physical injury to person or other property), which is only recoverable where there is a special relationship of proximity amounting to reliance by the plaintiff on the defendant, or where truly consequential on actual physical injury to person or property. The existence of a defect unrepaired because its cause is not investigated would give rise to economic loss only and no cause of action, until it did cause damage to other property, and the fact of prior knowledge would not bar the action.[126]

Whether where the law stands is satisfactory or not it remains true that in relation to construction the ultimate source of the facts that may create the need for a remedy wil be a contract to build, or for work or materials. The extent to which the rights and benefits that flow from such contracts can be passed on or relied on by those beyond the immediate contracting parties is a large factor in determining the need for a remedy beyond a contractual remedy. It is in this sense that the English experience has been seen by practising civil lawyers, namely as an extensive application to expand the circle of beneficiaries to third parties in the building contract sense, particularly subsequent purchasers.[127] Future direction will be linked to the

[126] Although if the owner ought reasonably have diagnosed and repaired it contributory negligence might be applicable, Nitrigin Eireann Teoranta v IncoAlloys Ltd. (1992) 1 W.L.R. 498.

[127] V. van Houtte, Issues under civil law jurisdictions. (1993) School of Business and Industrial Management, unpublished papers.

debate addressed by the Law Commission,[128] and, under the auspices of the EC, by GAIPEC,[129] although the Building Act 1984 could have a potentially wide impact.[130]

[128] Law Commission, Consultation Paper No. 121, Privity of Contracts: Contracts for the Benefit of Third Parties. Considered under Future Directions.

[129] *Le Groupe des Associations Industrielles Professionalles Européenes de la Construction*. Referered to under Harmonistation and Future Directions.

[130] Section 38 of the Act provides that, subjecy to the provisions of the section, breach of a duty imposed by building regulations shall be actionable, so far as it causes damage and except as regulations provide otherwise. Now a decade on no regulation bringing the section into force has yet been made.

[11] **HARMONISATION**

1 An Initial Approach

The construction industry has been identified by the EC as having an important part to play in the creation of a single European market,[1] but the objectives of an economically free and open market inevitably impact to varying degrees on national rules and practices governing the relations of its participants. An original view of didactic rule-making as a means of harmonisation has given way in areas to a new approach reflecting greater sensitivity to decentralising trends,[2] and greater understanding that union does not require the imposition of rigidity.[3]

The Single European Act required that the European Market be based on a high level of protection for consumers with regard to health and safety, and certainly in these areas the establishment of common rules of a rigid nature continues; but the reception into national law of such technical requirements is less likely to pose problems deriving from different approaches of legal systems than matters affecting the structures and organisation of the construction industries. There is inevitably no clear boundary between these aspects, just as the features of an industry are not susceptible to the divisions

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1 The Single European Act of 1986 has among its objectives the promotion of the free exercise of economic activity within the EC, and by 1st July 1987 had been adopted by all Member States. A. McGee and S Weatherill, The Evolution of the Single Market : Harmonisation and Liberalisation. (1990) 53 M.L.R. 578.

2 The concept of subsidiarity truly reflects this, as seen within Article 3b of the Treaty of Maastricht: "The Community shall act within the limits of the powers conferred upon it ... In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed actio cannot be sufficiently achieved by the Member States ...".

3 Weiler, The Transformation of Europe. (1991) 100 Yale L.J. 2403.

of departmental responsibilities.[4]

The resolution of the European Parliament of October 1988 called for the standardisation of contracts and controls in the construction industry, and, whilst this may have been viewed initially as the means to achieve harmonisation, there has been a rethinking and more refined approach, although the formulation of rules affecting health and safety, and consumer protection, has advanced.

In 1987 the EC requested the preparation of a study of rules affecting liabilities in the EC countries, and this resulted in the Mathurin Report of 1990,[5] being an investigation into the question of responsibilities, guarantees and insurance in the construction industry. It identified numerous main differences between Member States in the ways in which many issues in the construction industry are dealt with concerning, for example, building control regulations, the responsibilities of different disciplines in the industry, controls during construction, quality assurance, subcontracting, legislation, and approaches by courts to liability and damages, periods of limitation, burdens of proof, apportionment of liability between different parties, post construction liabilities, protection for private house purchases, and professional liability insurance.[6]

The study recorded that "few countries have truly satisfactory legal systems and that loopholes, uncertainties, complications and divergences abound". This conclusion was not surprising, since in each Member State the legal system has to do its best to provide means for resolution of disputes which are, by the nature of the project itself, full of complexity, even within national contexts. In a project which may from design concept to completion

[4] The Directorates-General of the EC Commission of each of Industry, Competition, Consumer Affairs, and Internal Market have significant responsibility for critical features affecting the construction industry. The Commission has organised itself into 23 separate Directorates-General or "DG's" in order to deal with the amount of work. Each is responsible for different sections of work, and as different DG's are assigned primary responsibility for different legislative measures there are major difficulties created in co-ordination as a result.

[5] Commission of the European Communities; C. Mathurin, Controls, contracts, liability and Insurance in the ConstructionIndustry in the European Communitt, 12th February 1990.

[6] Resulting from this study of a wide variety of topics a working paper was drawn up, and examined at a meeting of the GRIM (Groupe Réflexion, Information, Management) in October 1990, which resulted in a decision to focus on the areas of liability, legal guarantees, and financial cover for such, all to be based on a common terminology.

of construction take several years, involving input from numerous interdependent disciplines, it would be unreasonable to expect otherwise. The Report continued wisely:

> "in view of: the size of the sector in question and interests at stake; the number of people involved in the construction process and the different industries and professions belonging to it; the fact that any moves towards harmonisation would have a bearing on the laws, traditions and legal principles on which the relevant national legislations are based, caution is called for before embarking on the harmonisation suggested by the study, whilst naturally not losing sight of the objectives of the Treaty."

An acceptable and lasting model for dealing consistently throughout the EC with questions such as when, in what circumstances, for how much, and against whom liability for defective construction work should arise must be viable. History suggests that a permanently acceptable model is far from easy to find, but permanency in the sense of rigidity is not a desirable end. A model must be able to contend, for example, with the pendulum of public conviction at one extreme that the consumer must accept the risk of defects, and at the other that there should be strict liability of the supplier to the consumer regardless of fault for injury caused by a defective product or services. Arguments are provided at whatever point the pendulum may be for continuing its momentum towards one extreme or the other until time swings it in the other direction. The system for creating EC legislation and implementation in Member States inevitably takes time and so decisions must be sound in respect of principles. These principles ought to be wide enough to enable such swings to take place within their spheres.

The formulation of them is not a mere drafting exercise. The Report identified differences in rules affecting the ascertainment and attribution of liability, and considered suggestions of which some were technical, and some touched on the sphere that properly required a wider approach of the comparative lawyer; particularly the suggestion for the preparation of model contracts based on standardised terminology and definitions of the basic role and functions of the primary participants in the construction process. It must have been without surprise that difficulties were raised, not just because of different legal cultures, but from sectional interests in the construction

process.

Obstacles will always be presented, and undoubtedly they exist in fundamental risks in contracting perceived as inherent in different Member States,[7] but the distance of the goal should not prevent the journey. Nor should it be felt that the "great initial division"[8] between common and civil law is the only hurdle. Civil law systems are by no means uniform, and their kinship is more apparent to the common lawyer than to those subject to them. Certainly it must be recognised, and applauded, that in significant parts of Europe there has been an unmatched exercise in harmonisation of private law; by the *Code Napoléon* , but experience and development of a theoretically complete code has been overlaid and adapted as society's needs evolved.[9] The articles of the Code Civil were pegs on which to hang the perceived requirements of developing societies, and the variety of private law systems within Europe raises not for the first time to what they would be an obstacle to union, and to what extent the variety would be reduced.[10] The union of England and Scotland provides a yardstick, demonstrating that a private law system of different root is no obstacle to harmonisation;[11] and, equally, demonstrating that where harmonisation depends on legislation that is to be common, a different system of private law will not be subsumed or disappear.[12]

2 Safety, Products, and Services

Technical aspects for harmonisation have proceeded. Since the publication by the European Commission in 1985 of its White Paper on the implementation of the internal market, reinforced by the Single European

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[7] Professor P. Capper, Obstacles to Free Competition for Public Works Contractors - An English View, a paper delivered at Birmingham University, 23rd April 1993.

[8] Professor F. H. Lawson considered points, worthy of revisiting, in Private law Aspects of Western Union, first published in 1949, Current Legal problems, and now in The Comparison, Selected Essays, 1979.

[9] Professor Lawson cited the *stipulation pour autrui* being borne from a perverse interpretation of the *Code Civil*, and indeed it is contrary to a true analysis of Roman law roots, as considered under Third Party Benefits.

[10] Professor F. H. Lawson, Private law Aspects of Western Union, 1949, in The Comparison, 1979.

[11] Other models are the union of Louisiana with the United States, andthat of Quebec with Canada.

[12] Nor even when initial or apparent uniformity is created by the reception of a foreign law; as with the reception of Swiss law in Turkey, or as shown by the development of the *Code Napoléon* in Italy.

Act, numerous proposals for legislative measures were made by the Commission. A "new approach" to technical harmonisation and standards relating to products adopted by the Council in its Resolution in May 1985, determined that EC legislation through Directives should be limited to matters concerned with "essential safety requirements (or other requirements in the general interest)".

Since the Treaty of Rome in 1957 there has been a strong movement that affects the construction industry in relation to the importance of safety requirements for the protection of the end user, and consumer interests have grown in political importance.[13] Measures proposed or adopted by the Commission concerning the safety of products and to a lesser extent services have been along two routes. One has concentrated on encouraging safety by obliging Member States to introduce laws creating liability to consumers or end-users of manufacturers, producers of suppliers for damage caused by defects in products marketed or by services inadequately provided. The other has been to develop a common approach towards ensuring high standards of design and manufacture whereby only safe products, and safe end-results of services, may be placed on the market.

On the first route, a Product Liability Directive[14] had been adopted in July 1985. It was aimed at approximating in all Member States the liability of the producer of industrial products made for private use, including products used in the construction of buildings and other immoveables. The main provisions are: liability without fault, subject to exonerating circumstances,[15] and liability without limit of all producers in the process chain, jointly and

[13] Two statements of policy are material, to which the Commission in consequence of those developments is directed by the Single European Act: (a) By new Article 100A(3) of the Treaty of Rome: in adopting measures for the establishment and functioning of the internal market, the Commission in any proposal to the Council "concerning health, safety, environmental protection and consumer protection will take as a base a high level of protection"; (b) "The Conference wishes by means of the provisions of Article 8A to express its firm political will to take, before 1 January 1993 the decisions necessary to implement the Commission's programme described in the White Paper on the Internal Market", Article 13.

[14] Directive 85/374/EEC dated 25th July 1985. It was not required to be brought into force until 30th July 1988. The Consumer Protection Act 1987 was passed in order to implement the Directive. Part 1 relating to product liability came into force on 1st March 1988.

[15] Exonerating circumstances include proof that the state of scientific knowledge at the time when the product was put on the market was not such as to enable the existence of the defect to be discovered (unless a particular Member State provides otherwise), or that the defect was due to compliance with mandatory regulations of public authorities, or in the case of the manufacturer of a component, that the defect was attributable to the design of the product in which the component was fitted, or to the product manufacturer's instructions.

severally for the whole of the damage, for death or personal injury, and for damage to private property of a type intended for private use, excluding the defective product itself. The onus of proof required of the consumer is only proof of a defect and damage, and a causal relationship between the two, although liability may be reduced or disallowed if the damage was caused by negligence on the part of the injured person or a person for whom the injured person was responsible.

Along the second route towards ensuring the safety of products throughout the Community, there were measures or proposals directly relevant to the construction industry,[16] particularly; the Construction Products Directive;[17] various interpretative documents' explanatory of the "essential requirements" of it; a Council Resolution adopted in December 1989 for a global approach within the Community towards certification, testing and other quality measures for industrial products; a Council Decision of December 1990 (90/683/EED) defining modules for the various phases of the conformity assessment procedures intended to be used in the Technical Harmonisation Directives, of which the Construction Products Directive is one; a proposal for a regulation laying down rules for affixing the 'CE' mark of conformity in respect of the design, manufacture, marketing, putting into service and/or use of industrial products.

The Construction Products Directive establishes essential requirements necessary to ensure that products for use in construction works will be fit for their intended use.[18] This appears wider than the Product Liability Directive, not only in that it is a design brief for all construction products, but in its reference to fitness for purpose, albeit limited, which is expressly excluded as a factor in determining liability under the Product Liability Directive.[19] The

[16] Rreviewed by P. Long, The Opening of the EC Construction Market: Harmonised Liability Rules for Construction, a paper delivered to the IBA, September 1992.

[17] 89/106/EEC. Adopted by the Council on 21 December 1988 Member States were required to bring it into force by 27 June 1991. In England the Construction Product Regulations 1991 came into force in December 1991, and while containing extensive powers of enforcement vested in authorities, they do not expressly confer rights for the end-user.

[18] Article 2 of the Directive (para. 1) requires that products should be placed on the market "only if they are fit for their intended use, that is to say that they have such characteristics that the works in which they are to be incorporated ... can, if properly designed and built, satisfy the essential requirements ...".

[19] " ... the defectiveness of the product should be determined by reference not to its fitness for use but to the lack of safety which the public at large is entitled to expect ... ", Products Liability Directive, sixth recital.

essential requirements are set out in the Directive relating to six objectives, namely mechanical resistance and stability; safety in case of fire; hygiene, health and the environment; safety in use; protection against noise; and energy, economy and heat retention. The Directive is supplemented by separate interpretative documents covering each of six areas.[20] These are intended as directions to EC and national standards authorities, or technical approvals for particular types of construction products, which will link the standards or technical approvals with the essential requirements and take account of different levels of essential requirements for certain works, and different conditions prevailing as between one Member State and another.

These standards or technical approvals are not mandatory under EC legislation, but they provide the benefit that, through a system for certification or attestation of conformity, the producer may market the product in any Member State, overcoming any national barrier that might otherwise apply.[21] Without them, a product must be proved in other ways to satisfy the essential requirements in order to ensure marketability in a Member State. If products supplied enable works into which they are to be incorporated to satisfy the essential requirements, subject to the works themselves being properly designed and built, and if the products bear the CE mark, indicating compliance with relevant standards) member states are required by Article 4.2 of the Construction Products Directive to presume that the products are fit for their intended use, and permit them to be marketed across borders. This does not, however, mean that if a product is subsequently found to be defective, the supplier will necessarily escape liability under the Product Liability Directive.

Services Liability Directive

A proposed Services Liability Directive was published in early 1991,[22] intended to promote the safety of services as part of the relaunching of the consumer protection policy of the Council of Ministers and to require the elimination of differences in protection provided by different Member States,

[20] Drawn up by Technical Committees of the Commission in which the Member States participate.

[21] S. Chaney, European Norms for the Construction Industry - How to Respond to Technical Barriers in the form of National Forms, a paper delivered to the IBA, September 1992.

[22] OJ, No. C 12/8, 18th January 1991.

in order to remove barriers to trade between them. The main proposals in the directive were: a reversal of the burden of proof of fault by the supplier, in favour of the consumer; a broad definition of "services", so including services in the construction industry; compensation for death, personal injury, and serious physical damage to movable or immovable property; liability without limit, with joint and several liability where "liability for a given damage is shared between several persons"; short limitation periods for bringing proceedings and termination of liability "except where services relating to the design and construction of immovable property are concerned".

Services relating to construction works had been excluded from earlier drafts of the proposed directive. which emanated from DG XI, responsible for consumer protection. Even if it is right that liabilities for services relating to works of construction can properly be equated with and brought within a general directive on services, the terms of the proposal appear inconsistent when measured against the provider of other services, and the manufacturer or supplier of products, and also to be inconsistent with the terms of the Product Liability Directive. Certainly this proposal created controversy in the construction industry.

By way of example,[23] the proposed directive on liability for services applies to services relating to all movable or immovable property where the service is transacted on a commercial basis, and only when the question of damage is considered that the directive is limited in effect to injury to persons and private property. Damage to private dwellings caused by defective design or construction, or inadequate supervision of construction would come within the Directive, and the liabilities of architects, engineers, contractors and others involved in the design or the construction or supervision of construction of immoveables into which defective products are incorporated will extend further under the Services Liability Directive than any liabilities attributable to the supplier of the product, under the Product Liability Directive.

[23] M. Ludlow, Recent EC Measures affecting the Construction Industry in EC Member States. (1991) I.B.L, 543.

Further, the Product Liability Directive requires rights of claim to be extinguished ten years from the date when the product is put into circulation. This is on the ground that products age in the course of time; higher safety standards are developed, and the state of scientific knowledge and technology advances, and so liability should expire after a reasonable time. No similar approach appears in the proposed Services Liability Directive. Different periods are there provided: five years from the supply of the service except in relation to the design or construction of immovable property, where the period is twenty years.[24] In the case, for example, of a contract for the rewiring of a private dwelling the service is unlikely to be within the definition of "the design or construction of immovable property", yet the expected useful life of the work done is likely to be well in excess of five years. If the dwelling is burnt down six years after the provision of the service because of defects in the wiring not known to the owner of the dwelling. It might be within the reasonable expectation of the consumer that he should have a right to claim against the rewiring contractor for his defective work, yet the terms of the proposed directive might debar him.

Evidence that the defect which caused the damage was a defect in a product, the wiring itself for example, rather than merely in the supply of the service of installation, would permit reliance on the longer ten year limitation period of the Product Liability Directive. There would also be the necessity to trace the producer being the manufacturer of the finished product, the wiring, or of a component part of a larger defective product into which the wiring was incorporated. If there were real doubt as to whether the damage was caused by defective wiring, or a defective fuse which caused the wiring to be overloaded, or poor workmanship in the service of installation, liability would then involve the suppliers of both the wiring and the fuse, and the installation contractor. The complex structure argument raised in D & F Estates would become a reality, even apart from differing chances of success as between national courts.

[24] Article 9, "Extinction of Rights". The 20 year period of limitation proposed for services in the construction industry conflicts with strong views expressed in some parts of the EEC involved in the construction industry, that even a 15-year period is too long. The 15-year period adopted in the Latent Damage Act 1986 was on the recommendation of the Law Reform Committee who in their 1984 report concluded that "a twenty year period might permit some very stale claims and expose many defendants to the risk of litigation for an unreasonable length of time".

The services involved in the design and the construction of building or civil engineering projects are complex and so also are provisions to promote high standards of safety which at the same time may inadvertently create barriers to a right of establishment or freedom of movement of labour within the single market. Construction services may be less obviously important in relation to harmonisation of the "high level of protection" to the consumer called for by Article 100A(3) of the Revised Treaty of Rome than other businesses such as vehicle repairs, package holidays, coach travel or the design of standard medical products.[25] Services in the construction industry tend to be individually tailored. Even in the design and construction of a housing estate, each house requires separate considerations if for no other reason than that the soils in which the foundations for a house are to be designed and constructed can never be guaranteed to be the same as its neighbour, and because the product can never be mass produced or produced under factory conditions.

3 Further Thoughts

Even from a view of France and England alone, it is apparent that the systems for divisions of responsibilities in the process of designing and erecting buildings or other structure, developed in different Member States over centuries in different ways, must create dangers for instant harmonisation. The systems largely work because those who have been brought up in the industry have learned how they work from experience. Harmonisation of experience can only be achieved through analysis of the influences on that experience and understanding of the principles by which the differing experiences have been guided.

There is also danger in framing particular directives without considering all others whose effects may overlap, let alone considering the perception of the differing systems within the Community of the words adopted as requiring implementation. While differences in the implementing legislation in Member States are to be avoided, differences will be exascerbated by assumption of a common result from an apparently straightforward

[25] J. Steiner, Coming to Terms with EEC Directives. (1990) 106 L.Q.R. 144.

formula.[26] Member States are likely to find difficulty enough in their own implementing legislation in harmonising the effects of overlapping Directives, but more difficult will it be to achieve harmonisation of the effects of the required legislation without that understanding and feel for the experience and attributes of the differing legal systems that comparative study reveals. In both these aspects it appears that the means may themselves defeat the end.

The controversy that ensued from the overlapping into the construction industry world of the proposed directive on the liability of suppliers of services,[27] prompted a proposal for a specific construction directive to the intent that construction would be excluded from the liability of suppliers of services directive, which led to the formation of the GAIPEC groups.[28] This group was charged with consideration of four aspects: acceptance of the works, liability arising from the works, guarantees in respect of them, and insurance cover, and its proposals of 1992 will influence the Commission, although the text is a preliminary to any formal stage.[29] There cannot be any certainty that such a directive will be progressed because of the central issue whether the degree of regulation would be regarded as compatible with the principle of subsidiarity.

By virtue of the terms of reference, the results of GAIPEC's work do not take into consideration aspects relating to the justification for Community action, particularly the legal basis for it, the subsidiarity principle, or questions of desirability or need. These were addressed in an interesting Discussion Paper, which raises the questions in a manner requiring thought as to the comparative function of existing rules and mechanisms of national systems

[26] "Federal" is an interesting example.

[27] The draft directive on the liability of suppliers of services was announced by DG IX for Consumer Affairs during the time that Claude Mathurin was compiling his report; "To say that this proposal took construction industry professionals and DG III by surprise is something of an understatement", from Professor P. Capper, Developments in Liability under European Community Law, in Legal Obligations in Construction, Uff and Lavers (eds.) 1992. As to the history, and the potential future of the construction liability directive; J. Huse and N. Blackaby, Harmonisation of Construction Liability in the EC, a paper delivered to the Society of Construction Law, February 1993.

[28] *Le Group des Associations Industrielles Professionelles Européenes de la Construction.* This group was established in 1991 after consultation with the European Federation of Contractors, whose Vienna Report of 1988 had addressed aspects that came to be studied by Mathurin.

[29] The report has been described in the Commission as a coherent package with many suggestions on the diverse themes in question. Developments concerning the general directive on the liability of suppliers of services are also expected to have a direct bearing.

with a view to debate as to the means of harmonisation, rather than by mere identification of the fact of different rules.[30] The point that different systems of liability create a hindrance to the aims of the Community is posed there in terms of cost, leading to distortion of competition which might be mitigated if each participant's obligations were identical. Sub-contracting, under different legal regimes, is also identified as a problem area to be equally mitigated by common principles. The existing regulation that has taken place in the construction industry is there identified as likely to benefit from co-ordination and supplementing, particularly so in respect of Public Works,[31] where, as postulated, the extant rules concerning competition would be more effective after the harmonisation of liability and guarantee costs.

Pragmatically, the Discussion Paper recognises the attachment to national systems with different procedures for acceptance of work, and the deep rooted nature of construction in national law, and the idea is expressed that support measures, mutual recognition, and framework directives may be more appropriate, rather than regulation and detailed rules. For the common lawyer, the attention given to acceptance of work, its relationship with the right to payment and transfer of risk, and its detailed arrangements is notable, as also is the emphasis on the guarantee as the means of redress. Other areas where adaptation of aspects for incorporation into national systems is to be considered are the transfer to successive owners of the ability to bring proceedings, grounds for exclusion of liability deriving from *force majeure* or acts of third parties (the professional when not acting as agent) and questions of responsibility for choice of construction materials.

On the analysis of aspects in the thesis to this point it is thought that the concerns and problems of French and English law in the operation of construction contracts bear out that it is not necessarily legal structures themselves that create barriers, especially when tested against the end results, rather it is the embedded preference for procedures and characteristics simply

[30] The Commission Staff Discussion Paper, Concerning Possible Community Action With Regard to Liabilities And Guarantees In The Construction Sector, June 1993.

[31] The Public Works Contracts Directive 71/335 as amended by Directive 89/440and consolidated in the proposed Directive of 9th January 1992, on which the Council adopted acommon position on 18th June 1992. Directive 90/531 of September 1990 on procurement procedures in the water, energy, transport and telecommunications sectors, and its amendment adopted in December 1992. Directive 92/50 of June 1992 on coordination of procedures for the award of public service contracts.

representing the way things have always been done. Recognition beyond acknowledgement is required to appreciate the features by which a harmony of end result may be achieved, and where barriers exist. This can be tested further; in the contexts of required performance and changes to it, completion, and acceptance and payment.

1 The basic obligation

The GAIPEC proposals assume that liability will be based on recognisable concepts of fault and breach of contract, but the line of responsibility is critical to its suggestion that liability be restricted to loss caused by the individual acts or failures of the particular participant.[1] For example an employer will be less interested in the respective contributions of the contractors and consultants where relevant design responsibility reposes in the former. Impacting on this however are regimes for the requirement of and restrictions on changes in the work by the contractor

Prima facie, unauthorised deviation from the plan or specification is regarded as a breach of contract, but this general rule gives rise to exceptions. The nature of construction work, particularly its relationship with the land, will give rise to changes from original perceptions of it even without changes of mind as to what work is required. A balance to be made is between the width or narrowness of the definition of the work to be done so that changes brought about by the requirement to do that work are within the price, and the facility for the employer to secure that the contractor brings about a successful construction which may necessitate the imposition of changes on him by the employer.

The starting point is the scope of the contractor's obligation, and, given detailed stipulations by way of plans and specifications, the obligation is to comply. This may be part only of the obligation to produce the promised result, which includes the *obligation de bien faire l'ouvrage* under French

[1] J. Huse and N. Blackaby, Harmonisation of Construction Liability in the EC, a paper delivered to the Society of Construction Law, February 1993, suggest that a cost reduction might have been in mind as the result of such individualisation of responsibility.

law, the obligation to execute the work well. In England the obligation to carry out and complete carries implicitly the requirement within the price to do all things indispensibly necessary to achieve the described work,[2] and regarded as a question whether the contractor is excused from his obligation to complete without additional payment, it may also be described as the absolute obligation to complete.[3]

Common law contracts have not sought expressly to define this basic obligation, or to address its application to the everyday situations of construction work, and it has been left to the courts to work out the implications.[4] The common law view is that the contractor, when he undertakes to carry out and complete work to the design of the architect or engineer of the employer warrants his ability to do so, though not its suitability for its purpose once completed. If bringing the work to completion to that design or in the physical conditions actually encountered is difficult, or not practicable, without some change in the design itself or in the expected temporary works or working methods, the contractor is nevertheless in breach of contract, and will not be able to recover additional payment if he finds himself obliged to change the design or temporary works or working methods in order to carry out his primary obligation to bring them to completion.[5]

Site conditions may either be more adverse at the time of entering into the contract than available information may have suggested, or else subsequent events may render them so. Under English law, in the absence of express provision, this will be a contractor's risk to be surmounted without adding to the inclusive prices of the contractor, or affecting the absolute obligation of

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[2] Williams v Fitzmaurice (1858) 3 H. & N. 844.

[3] Absolute in the sense of independent of fault.

[4] The definition of work in wide terms in a lump sum contract makes easier the application of the inference of an obligation to provide everything indispensibly necessary, but the question of what is included has to be answered as a matter of construction even where the description is by items in bills of quantities.

[5] The classic cases in England are the 19th century House of Lords decisions of Thorn v London Corporation (1876) 1 App. Cas. 120, and Tharsis Sulphur & Copper Co. Ltd. v McElroy (1878) 3 App. Cas. 1040. The contractor need only, however, vary the work sufficiently to achieve his obligation to complete, and its subsequent failure will not be his responsibility.

the contractor to complete.[6] Adjunct to this is the principle that an employer does not impliedly warrant the accuracy or practicability of plans, drawings or bills of quantities.[7]

In France the allocation of ground risks under construction contracts is by a presumption of a strict liability on the part of the contractor, both under the principles of law applicable to private contracts,[8] and administrative law for public works.[9] The employer does however have an obligation up to the time of the issue of the construction permit to ensure in the preliminary stages of the project that an appropriate programme is produced covering all activities necessary for its execution.[10] For this he must adequately inform his architect and contractor of the conditions for performance of the work,[11] and,

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6 As in Bottoms v York Corporation (1892) Hudsons Building Contracts, 4th ed., Vol. 2, 208 (C.A.) where a claim was made for additional costs incurred during sewerage work, which had arisen due to the fact that water pressure caused every shovelful of mud removed from the excavation to be replaced. Boring samples had not been taken prior to the start of the work and before the contract was signed, the employer was aware that the price offered by the contractor would insufficient in view of the soil to be expected. The contractor vainly requested an adjustment of the price, terminating the contract when this was denied. The court held that since there had been no warranty by the employer with regard to the type of soil, the contractor had not been entitled to terminate the contract and the claim failed.

7 Thorn v London Corporation (1876) 1 App. Cas. 120 (H.L.); Lord Chelmsford at 133: "If the Plaintiff had considered, as he was bound to do, the terms of the specification, he would either have abstained from tenering for the works, or he would have asked the Defendant to protect him from the loss he was likely to sustain if the plan of working described in the specification should turn out to be an improper one." Also as in Re: Nuttall and Lynton and Barnstaple Railway (1899) Hudsons Building Contracts, 4th ed., Vol. 2, 279, involving excavation work, the employer made clear with regard to the data on measurements contained in the specifications that they were not to be viewed as absolutely correct, but rather served as information for the contractor. The contract documents provided that the contractor was to satisfy himself as to the soil and all presumable measurements. The excavated material transpired to be more than that indicated in the specifications and drawings. The court rejected the contractor's claim for reimbursement for the additional costs.

8 Under lump-sum price contracts, Article 1793 compels the contractor to obtain a written supplement to the contract for additional expenditure as a result of soil obstacles. Article 1793: "If an architect or a contractor has undertaken to construct a building for a lump-sum price - in accordance with a plan determined by theemployer and agreed upon with him - then he may neither demand any sort of price increase - for instance, under the pretext of increased job costs or increased consumption of material - nor assert changes or cost-increasing conditions in this plan, in so far as these changes or added expenditures were not agreed upon with the employer in writing in the form of a fixed price." Under measurement contracts, additional work beyond that for which lump-sum prices had been originally agreed upon entitles the contractor to additional payment; J. Catz, Les Constructeurs et le Risque du Sol, Editions du Moniteur, 1985, note 1, 63-64 (private construction contracts) and 104f. (public construction contracts).

9 Liet-Veaux, Le Droit de la Construction, 9th ed., 337. This is even more emphasised the more highly specialised and qualified the contractor, Cass. civ. 3, 17 October 1973, Bulletin des arrêts de la Cour de Cassation, p. 389.

10 Liet-Veaux, Le Droit de la Construction, 9th ed.,246, 348. Under AFNOR 91, article 1.4.8, the programme is the general schedule into the deadlines of which the contractor prepared work schedule must be fitted.

11 The documents required for this are not binding; but a working group at the French Scientific-Technical Centre for the Construction Industry has drafted a leaflet regarding soil data to be supplied by the employer in apartment construction; DTU (Document Technique Unifié), Instructions pour la rédaction d'un contrat de reconnaissance des sols.

through both the *Cour de Cassation* for private contractss,[12] and the *Conseil d'Etat* for public works,[13] the employer is obliged to make known any soil risks.[14]

In the legal framework for public works recourse is available to the doctrine of *imprévison* , as developed by the *Conseil d'Etat* , where some event independent of the will of the parties transpires that was not foreseeable, is attributable to unusual difficulties, and, in essence, leads to the negation of the contractual basis for the transaction.[15] Analysis has shown that the influence of this doctrine has been marked in the field of risk from unknown soil conditions and that it does represent a considerable amelioration of the risk ordinarily allocated to the contractor.[16]

2 Changed Conditions

In English standard forms, particularly civil engineering contracts, unfavourable physical conditions clauses have been commonly found for more than half a century. Either expressly or impliedly, these clauses are based upon a concept of reasonable expectation or foreseeability. The best example is clause 12 (1) of ICE 91:

> "If during the execution of the Works the Contractor shall encounter physical conditions (other than weather conditions or conditions due to weather conditions) or artificial obstructions which conditions or obstructions could not in his opinion reasonably have been foreseen by an experienced contractor the Contractor shall as early as practicable give written notice thereof to the Engineer." *

The clause then provides in detail how the engineer is to react to this notice request that the contractor justify the added costs; issuance of instructions to remove impediments; and, valuing for reimbursement additional costs to the contractor.[17]

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[12] Cass. civ. 3, 20th February 1970; Bull. civ. 1, 17th March 1969, D. 69, p.532.

[13] Conseil d'Etat, 21st July 1970, Recueil Lebon, 533.

[14] Corresponding duties arise under the standard terms of contract of the professional organisations of architects and engineers, J. Catz, Les Constructeurs et le Risque du Sol, Editions du Moniteur, 1985, note 1, at p. 37-38.

[15] Considered under Relief from Performance.

[16] J. Catz, Les Constructeurs et le Risque du Sol, Editions du Moniteur, 1985.

[17] Such clauses are not found in the building as opposed to engineering standard forms.

The English approach has been described as "uncompromising in its enforcement" with regard to the contractor's strict liability for ground conditions; it might have been impossible for the contractor to ascertain the necessary information.[18] Further the risk depends on the extent of available information, and while clause 11 of the ICE conditions deemed that the contractor had inspected and examined the site and to have satisfied himself prior to tendering as to the nature of the ground and sub-soil, taking into account all information which may have been provided by the employer, there was no duty on the employer to provide information to the contractor.

Such an imbalance in the distribution of risk was not without its critics. It was considered absurd that construction projects be undertaken on the fiction that a contractor must tender on the basis of investigations either that might be inadequately undertaken or that were deemed but could not be performed in the time allowed for tendering, and maintained that it should be a matter for the employer to provide the contractor with such information on ground conditions as might reasonably be expected of him.[19] As some answer, ICE 91 introduced an obligation to provide all information as to ground conditions obtained by or on behalf of the employer, by deeming him to have made it available to the contractor, leaving the latter responsible for its interpretation for the purposes of constructing the works.[20] This does not overcome criticisms that it is the employer who, practically, decides the scope of investigation and that the uncertainties as to the division of risk lead to frequent disputes.[21]

The aspect of an employer's responsibility for the ground in which work is

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18 I. N. Duncan Wallace, Construction Contracts, Principles and Policies in Tort and Contract, 1986, 474 and 476 .

19 M.W. Abrahamson, Engineering Law and the ICE Contracts, 5th ed., 1985, 436f. Since uncertainty with regard to soil conditions is never able to be completely removed, Abrahamson recommends that contracors be given the opportunity to calculate such risks during the competition phase on a preliminary basis and then offer corresponding preliminary prices, including all costs to be expected for delay and interruption. M. Abrahamson, Risk Management - Adverse Ground Conditions [1984] 1 I.C.L.R 246, at 252.

20 ICE 91, clause 11 (1). The deeming raises interesting possibililities in the event of non-disclosure, through the mechanism of the Misrepresentation Act 1967; Keating on Building Contracts, 5th ed., 124 and 832f..

21 Keating on Building Contracts, 5th ed., 833..

carried out is seen more in developments in Germany,[22] rather than in France where the protective attitude towards the consumer-employer is strong.[23] Neither AFNOR nor the CCAG contain rules as to an obligation on the employer to inspect the ground, or to provide information to the contractor.[24] In public contracts the contractual allocation of ground risk to the contractor is typical of French construction practice as a whole and is seen from the few applicable provisions in the CCAG whereby, there is reference to the non-binding nature of notice given by the employer as to ground conditions and an express exclusion of responsibility for information provided to the contractor about them; reference only to those ground impediments expressly identified in the contract; lump-sum price agreements carrying the ground risks; and an absence of contract provisions for relief from the strict allocation of the soil risk to the contractor.[25]

In private contracts,[26] the position is much the same: the contractor is often met with additional work that becomes necessary as a result of ground conditions, whether by lump-sum price agreements under Article 1793 or by the exclusion of changes in lump-sum prices in measurement contracts. The position of the contractor is significantly less favourable in France than in Germany,[27] Switzerland,[28] or Austria,[29] for, although the owner is responsible

[22] From the 1926 edition of the VOB the soil risk has in principle been allocated to the owner. Described by Dr. C. Wiegand, Allocation of the Soil Risk in Construction Contracts. (1989) 6 I.C.L.R. 283.

[23] The responsibility of *tout constructeur* under the guarantee in Article 1792 expressly includes damage resulting from ground deficiencies.

[24] This situation has been termed astonishing with regard to the *Code des Marchés Public* whose 237 articles regulate in detail the awarding and arrangement of public construction contracts; Catz, at 79.

[25] Catz, at p. 139 (Nr. 508).

[26] Catz, at p. 139 (Nr. 511).

[27] The position in Germany can be summarised as follows: 1. Under both ¶¶645 of the BGB and article 9 of the VOB standard conditions, the presumption is that the owner is under an obligation to describe the soil clearly and so exhaustively that all bidders will understand the description in the same manner and be able to calculate their costs safely and without extensive preliminary work. 2. The bidders must be able adequately to evaluate the soil and its effective support, as well as groundwater conditions, on the basis of the description of the work to be performed. 3. Insufficient data provided by the owner on the soil will be taken to result in an unreasonable risk for the contractor, contrary to article 9(2) of the VOB conditions. 4. Nevertheless, the contractor is under a duty to examine the soil conditions prior to making his bid; by resort to the duty to exercise care customary in the trade the contractor remains obliged to inform the owner of any identifiable shortcomings in the description of the work. 5. The higher the degree of expertise on the part of the contractor and the greater the restriction on the owner over the soil (for example, construction on property of a third party), the stricter the contractor's duty to review. 6. A clause restricting the assumption of the soil risk to taking boring samples is viewed as an unreasonable detriment under ¶¶9 of 1976 legislation as to General Terms and Conditions of Trade and thus invalid.

[28] Dr. R. Meroni, Subsurface Ground Conditions - Risks and Pitfalls for Project Participants: Civil Law Projects - Legal and Contractual Approach in Switzerland (1990) 7 I.C.L.R. 198.

[29] Dr. C. Wiegand, Allocation of the Soil Risk in Construction Contracts, A Legal Comparison (1989) 6 I.C.L.R. 283.

for the ground within the framework of the programme that he establishes, all contractual risks arising from theground are in principle allocated to the contractor.

FIDIC goes further than ICE 91 in its clause 11 (1), commencing with the statement that "The Employer shall have made available to the Contractor ... such data on hydrological an sub-surface conditions as have been obtained by or on behalf of the Employer ... " and again the interpretation is left to the contractor, who is deemed to have inspected and examined the site and information available "so far as is practicable, having regard to considerations of cost and time". The extent of the investigations made on behalf of employers will have a potential impact for, importantly, the contractor is deemed to have based his tender on the data made available as well as his own inspection;[30] and the contractor is deemed to have satisfied himself as to the correctness and sufficiency of the tender and of the rates and prices in the bill of quantities which are to cover all his obligations uner the contract "except insofar as it is otherwise provided in the Contract".[31]

The provisions of FIDIC clause 12.2 and ICE 91 clause 12 (1) are substantially the same yet FIDIC adds a role for the employer in that the engineer is required to consult with him before embarking on the determination of the consequences of the contractor encountering unforeseen physical conditions or artificial obstructions, and it utilises terms of acceptance rather than approval in respect of measures that the contractor might take.[32] Despite criticisms of FIDIC that followed the nature of those aimed at the ICE conditions,[33] it is clear that French contractors would find it preferable, certainly for private works, to be governed by FIDIC principles in this area of

[30] FIDIC, clauses 11.1 and 12.1 utilise deeming in a variety of circumstances, commented on in E.C. Corbett, FIDIC 4th, A Practical Legal Guide (1991).

[31] Clause 12.1

[32] N. G. Bunni, The FIDIC Form of Contract (1991). The role required to be ptayed by the engineer can pose real problems of practise in civil law jurisdictions; Dr.F. Nicklisch, The Role of the Engineer as Contract Administrator and Quasi-Arbitrator in International Construction and Civil Engineering Projects. (1990) 7 I.C.L.R. 322; H. André-Dumont, The FIDIC Conditions and Civil Law. (1988) 5 I.C.L.R. 43.

[33] I. N. Duncan Wallace, The International Civil Engineering Contract, A Commentary on the FIDIC Form (1974) and Supplements.

sub-soil risks, rather than by the traditional French approach.[34]

3 The Power to Vary

The definition of the work and the application of the obligation to complete alone would without more give the contractor the right to carry out only that descibed work, that is in the absence of a variation of the contract itself which would require mutual agreement and consideration.[35] Variation of the contract works is invariably provided for in the express terms of the contract for an architect or agent of the employer has no implied power to vary either the contract itself, or the works under it, or to order as additions work impliedly included within the contract for which the contract price is payable.[36]

The power to vary may only be exercised within the scope of the contract and its terms as to the authority granted so that instructions beyond it do not impose liability on the employer under the contract: "The architect is not the employer's agent in that respect. He has no power to vary the contract. Confronted with such acts, the parties may either acquiesce, in which case the contract may be *pro tanto* varied and the acts cannot be complained of, or a party may protest and ignore them. But he cannot saddle the employer with

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[34] M. Frilet, How Certain Provisions of the FIDIC Contract Operate under French Laws (1992) 9 I.C.L.R. 121. J. Catz, Les Constructeurs et le Risque du Sol, Editions du Moniteur, 1985, 249: "the FIDIC certainly represents one of the best existing solutions in order to take care of the consequences deriving from sub-soil impediments during the performance of the works". Specific legislative reform in this area has been advocated by Catz, with a clear solution to the problem of soil risk. A new Article 1787 is advanced: in a first section an acknowledgement that the owner who himself selects the site is to be obliged to bear any additional costs that result from the geological nature of the soil with risk-allocation clauses being prohibited; in a further section should establish the basic responsibility of the owner to investigate thoroughly the soil prior to the start of the work and if needed, to be a matter for the commissioned architects to undertake or order soil examinations and to ensure that the construction project is prepared subject to the results of this investigation.
With regard to the lump-sum price rule in Article 1793 of the Civil Code, an express exception to the lump-sum price principle is recommended with regard to additional expenditures related to the soil risk in those cases in which conditions actually present deviate from those presumed in the contract. For standard terms of contract of architects' and engineers' professional associations, for the code for Marché Public de Travaux and for private and public general terms of contract, Catz considers corresponding modifications to be necessary, idem at p. 251 (Nr. 1045).

[35] The corollary that agreement to pay more for no additional work would fail for lack of consideration was overcome in Williams v Roffey Bros. & Nicholl (Contractors) Ltd. (1990) 2 W.L.R. 1153 (C.A.) by finding consideration in avoiding difficulties that would flow from not maintaining the relationship of main and sub contractor; R. Halson, Sailors, Sub-contractors and Consideration. (1990) 106 L.Q.R. 183; R. Brownsword, Contract, consideration and the critical path. (1990) 53 M.L.R. 536.

[36] Sharpe v San Paulo Railway (1873) L.R. 8 Ch. App. 597; Carlton Contractors Ltd. v Bexley Corporation (1962) 60 L.G.R. 331.

responsibility for them."[37]

Varied work done without request under a contract for specified works for a price will constitute a failure to perform,[38] but application of the concept of substantial performance will considerably ameliorate the rigours of the principle so as to permit recovery where changes, more usually omissions, do not deprive the employer of substantially the whole of the work.[39] If the varied work is in the form of better or more work it will not attract additional payment,[40] and consent by the employer to different work will only enable the contractor to recover additional payment for the difference where the employer knows or must be taken to know that it will cost more.[41]

Under JCT 80 "variation" is defined as the alteration or modification of the design, quality or quantity of the Works as shown on the contract drawings and described by or referred to in the contract bills.[42] The contractor is obliged to comply with architect's instructions in regard to any matter in respect of which he is expressly empowered to issue instructions and the architect has the power to require variations.[43] He may also sanction in writing any variation made by the contractor otherwise than pursuant to an instruction, even it seems where there has been no request of any kind, and this power

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37 Stockport M.B.C. v O'Reilly (1978) 1 Lloyd's Rep. 595 at 601.

38 In which case under an entire contract no payment would be due: Forman & Co. Proprietary Ltd. v The Ship "Liddesdale" (1900) AC 190 (P.C.), Lord Hobhouse at 205 "It seems hard that the plaintiffs should not be paid for work which they have done; but such is the effect of contracting to work for a lump sum and failing to do the work."

39 Where there has been substantial performance a deduction for the liability of the contractor for failing satisfactorily to complete, more often than not equating to the cost of completion, is the result, Hoenig v Isaacs (1952) 2 All ER 176 (C.A.).

40 Tharsis Sulphur & Copper Co. Ltd. v M'Elroy & Sons (1878) 3 App. Cas. 1040; the contractor would have to show an express or implied promise to pay. Under a lump sum contract the contractor was obliged to construct specified girders. It was not practical to adopt the specification and the contractor sought and was given permission to make them thicker, from which "... there is nothing in that to imply that there was to be a payment for that additional thickness", Lord Blackburn at 1053.

41 In principle save in those remote circumstances that fit in with Sir Lindsay Parkinson & Co. Ltd. v Commissioners of Works (1949) 2 K.B. 632 (C.A.), considered later, the contractor who without authorisation does more than was originally provided for by the contract is not entitled to demand a higher remuneration that the sum agreed upon.

42 JCT 80, clause 13.1 " .. including: .1.1, the addition, omission or substitution of any work; .1.2, the alteration of the kind or standard of any of the materials or goods to be used in the Works; .1.3 the removal from the site of any work ... other than work materials or goods which are not in accordance with this Contract; 13.1.2: the imposition by the Employer of any obligation or restriction ... or the addition to or alteration or omission of any such obligations or restrictions so imposed or imposed by the Employer in regard to: .2.1 access to the sie or use of any specific parts of the site; .2. limitations of working space; .2.3 limitations of working hours; .2.4 the execution or completion of the work in any specific order ..."

43 JCT 80, clause 13.2. The contractor has a right of "reasonable objection" to any variation for those particular matters in clause 13.1.2.

extends to unauthorised work not otherwise involving additional cost.[44]

In France the straightforward terms of Article 1793 have been used to fashion rules of practise. With its premise that for contracts on a lump sum basis the price stipulated remains valid under all circumstances, the result is, as in England, that unauthorised deviations from the plans and specification do not entitle the contractor to a greater remuneration than agreed upon. Unforeseeable circumstances in carrying out the contract work are in this way firmly placed at the risk of the contractor.

Article 1793[45] prohibits a price increase on the grounds of the effects of increases in the labour and materials elements of the work, so that results similar to the application of the English principle follow. Equally so as to the implication in England of an obligation to provide everything indispensibly necessary, for Article 1793 extends the prohibition in lump sum contracts to alterations or supplements made to the agreed plan, *changements ou augmentations faits sur ce plan* , unless authorised in writing and a new price agreed. That agreement has to be with the owner, and so the principles applicable in England in the absence of express authority of an architect would be well recognised. In France the *maitre d'oeuvre* equates to the architect or engineer but he is not regarded as the agent of the employer, but is considered to be an independent contractor bound by contract for the hire of work. The relationship between the employer and the *maitre d' oeuvre* is not seen as one of engaging someone to act on one's behalf in connection with a building contract but one of receiving advice.

Although Article 1793 is not mandatory as part of the *d'ordre public* , AFNOR 91 makes available a special appendix of modifying provisions if the works are to be treated as definitive, *ne varietur*, that is without any change in the nature or scope of the work from their definition on the plans and

[44] H. Fairweather & Co. Ltd. v L. B. Wandsworth (1987) 39 B.L.R. 106.

[45] Article 1793; *"Lorsqu'un architecte ou un entrepreneur s'est chargé de la construction à forfait d'un bâtiment, d'après un plan arrêté et convenu avec le propriétaire du sol, il ne peut emander aucune augmentation de prix, ni sous le prétexte de l'augmentation de la main d'œuvre ou des matériaux, ni sous celui de changements faits sur ce plan, si ces changements ou augmentations n'ont pas été autorisés par écrit, et le prix convenu avec le propriétaire."* [When an architect or contractor is responsible under a fixed price for the construction of a builing, according to a plan settled and agreed with the owner of the land, he may seek no increase in the price, whether on the basis of increases in labour or materials, or for changes or extensions to the plan if those changes or aditions were not authorised in writing and their price agreed with the owner.]

specification.[46] The prohibition on either the employer or contractor from unilaterally modifying the documents on which the agreement is based may only be overcome by an expressly agreed additional provision which must set out the effects on price and time.[47] Without such modification it is the employer who makes changes to the extent or nature of the works. They must be made in writing with work orders countersigned by the employer, and stating the price for the work involved or the mechanism for its calculation and the effect on completion dates.[48]

An employer or his architect may sometimes wish to use the contractual powers to instruct a change in the work for the future benefit of the structure. Where the need arises from a deficiency in the plans responsibility is not in doubt, but not so where the contractor is in difficulties in complying with the original design. Under AFNOR 91 the entitlement of the contractor to additional payment due to changes in the nature of the work as ordered requires also that they result from circumstances which are neither due to, nor the fault of the contractor.[49]

In civil engineering contracts temporary works do not usually form part of the employer's design, their selection and any design being left to the contractor, and again methods of working are almost invariably left to the contractor, but specifications frequently identify the working processes likely to be used and may also suggest a working method. These provisions, coupled with terms providing for work to be carried out under the direction and to the satisfaction of the employer's professional, have led to difficulties of interpretation. The contrasting views are, first, that the powers and requirements of the professionals are concerned only to secure the quality and integrity of the final work, and should be read in that restricted light. On this view they do not detract from the contractor's overall right to decide upon his preferred methods, and in particular they do not impose a duty on the architect or engineer, whether to the contractor or to third persons, to intervene and give instructions on these matters when difficulties arise or

[46] AFNOR 91, article 1.2.

[47] AFNOR 91, Annex D, Modifying clause for fixed lump sum Contracts defined as *Ne Varietur*. Lack of agreement on the new provisions leaves the contractor's obligation uner the contract extant, with the employer able only to terminate the contract.

[48] AFNOR 91, article 8.1.4.1.

[49] AFNOR 91, article 8.1.3.1.

are to be anticipated.[50] The second view is that the contract provisions when viewed as a whole, particularly if not really explicit, do impose such a duty on the adviser to take charge and give instructions. The English courts have opted for the first view,[51] unless the architect actively intervenes.[52]

The powers given to an architect or agent to issue instructions or to approve may well therefore not of themselves require or involve a variation, but in England there is danger in approving a proposal for alternative works. This is illustrated by *Simplex Concrete Piles v St. Pancras* [53] where the approval, which was undoubtedly of a change, was held to be a variation entitling the contractor to additional remuneration, notwithstanding that without it the contractor would have been in breach. By virtue of amendments introduced in JCT 80 the result in *Simplex* would probably not now be reached, for, if any work, materials or goods are not in accordance with the contract instructions may be given requiring a variation as are reasonably necessary as a consequence without additional payment.[54]

Under AFNOR 91 unauthorised changes entitle the employer on the proposal of the *maître d'œuvre* to require demolition, correction or making good to the exact contract requirements, and in addition deduct for the effects of such on the final works or the work of other contractors.[55] The contractor receives no aditional payment if such changes involve him in expense over the contract price, and the employer is entitled to any saving if the cost of the work as so altered is less than that originally envisaged.[56] Despite not being part of the *d'ordre public* the influence of the strict and protective nature of the French Article 1793 is substantial and it can be contrasted with legislative modifications applicable in Italy. The basic principle in the Codice Civile Article 1659 is that there can be no change in the manner of execution of the work unless authorised by the employer. Evidence of the authorisation is

[50] The professional may simply leave the contractor to extricate himself from his difficulties as best he can, subject to the employer's interests in the quality of the permanent work or in avoiding costly delays.

[51] Clayton v Woodman & Son (Builders) Ltd. (1962) 1 W.L.R. 585, and notwithstanding that the building standard forms have not been altered to curtail the architect's supervisory powers and responsibilities.

[52] Clay v Crump (1964) 1 Q.B. 533.

[53] Simplex Concrete Piles Ltd. v Borough of St. Pancras (1958) 14 B.L.R. 80.

[54] JCT 80, clauses 8.4.1 and 8.4.3.

[55] AFNOR 91, article 8.2.1.

[56] AFNOR 91, artcles 8.2.2 and 8.2.3.

required in writing although the requirement as to the form of authorisation does not go to the validity of the legal transaction, merely concerning the proof of the result.[57] Changes need not necessarily be reduced to writing in order to be given effect in that the *Corte di Cassazione* has decided that unauthorised deviations from the plans are not regarded as breaches of contract where the employer accepts the work without making any reservation.[58] In lump sum contracts authorised variations may give rise to additional remuneration where agreed.[59]

The breadth of responsibility for a defective building raises the considerations under the aspect of a duty to warn. Changes to the works brought about by incomplete or defective plans or specifications may equally impose a duty on the contractor to examine them and warn the employer if performance in accordance with the plans and specifications will lead to defective work. Where the contractor realises or ought to have realised that performance according to them will result in a defective construction, then a duty on the contractor to warn the employer, and culpable neglect of such duty rendering the contractor liable in damages,[60] will diffuse a clear liability for the design. This aspect reflects the difficulties presented in English law by *Lynch v Thorne*,[61] and explicit contractual obligations which, where followed, will result in a deficient building but from which deviation constitutes a breach.

Further, supervision of the contractor by an engineer may not eliminate but may limit responsibility for a result in accordance with the employer's expectations, but the contractor's position and consequent liabilities do change if, under the contract, the contractor is bound to comply with the engineer's design and variation instructions, without any initiative or critical review, in which case he has indeed become a *nudus minister* , a mere instrument in the hands of the engineer.[62]

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57 Cass. 14th July 1972, No. 2431, rep. foro it. 1972 iv. Appalto no. 13.

58 Cass. 15th July. 1966 no. 2055. mass giust. civ. 1966 1175.

59 Italian Codice Civile, Article 1659. Where the Italian modifications are of particular interest is where changes from the original plan or specification are necessary by reason of a "rule of art", or the proper application and workmanship within the standards of the industry. In these circumstances, by Article 1660, in default of agreement by the parties the court is given has power to establish or at least ratify the changes as variations, and to fix new prices if the parties cannot agree.

60 As in Italy, Cass. 22nd November, 1968 no. 3809, mass. giust. civ. 1968, 2000.

61 (1956) 1 W.L.R. 303.

62 Oddo v Vassello, Cass. 31st March1987, No. 3092 Mass. Vovo It. (1987) 528, "directly and totally bound by the instructions he received".

English law undoubtedly does have something which can be used as a comparison with the contractor's duty to warn as firmly established in civil law countries;[63] where, for example, in France the *Cour de Cassation* has consistently held that a contractor who negligently fails to caution against risks involved in the execution of the plans may incur liability for damages, but the exception exists in respect of the employer who himself is experienced in construction work,[64] and the extent of the powere to vary may be limited.

4 Limits on the Power

In English law the terms of the contract as to the power to order variations may as a matter of construction provide a limit on the extent of the ability to require more work, and where additional work has been done beyond it then recovery may be upon a quantum meruit, as for work ordered outside the contract.[65] Some guidance may be gained from the *Parkinson* case,[66] where the parties to a contract for the construction of a munitions factory entered into a deed of variation requiring exceptional working methods to overcome existing delays; with the work to be required to be paid on the basis of the rates and prices in the original contract, and with a maximum profit limit for the contractor. The work ultimately ordered was found to have greatly exceeded that contemplated by the deed of variation, including its profit limit. The argument that there was an unlimited ability to order extra work was rejected, and the contractor recovered on a quantum meruit for the uncontemplated additions.[67] The terms of the original contract had given wide powers to the Commissioners at their absolute discretion to modify the

[63] Referred to under Liability for Defects.

[64] Cass. civ. 13th May 1971, Bull. civ.. 1971 III 212 No. 297.

[65] For example, work requested after completion; Russell v Sa da Bandeira (1862) 13 C.B. (N.S.) 149.

[66] Sir Lindsay Parkinson & Co. Ltd. v Commissioners of Works (1949) 2 K.B. 632 (C.A.). This decision has to be treated with caution with regard to any principle; first, because it relied on the discredited case of Bush v Whitehaven Trustees (1888) Hudson's Building Contracts, 4th ed., Vol. 2, 122 [not "worth recording as an exposition of any principle of law" Lord Radcliffe in Davis Contractors Ltd. v Fareham U.D.C. (1956) A.C. 696 (H.L.) at 732], and second because of its special facts relating to the Deed of Variation, as explained in McAlpine Humberoak Ltd. v McDermott International Inc. (1992) 58 B.L.R. 1 (C.A.).

[67] The profit limit was £300,000. The contemplated amount under the deed for the work was about £5 million. The ultimate amount was £6.68 million.

extent, character and quantities of the work "... without vitiating or in any way making void the contract ...", and while the court left open the question whether the contractor would have succeeded in the same manner under its terms it is thought that he would not.

The scope of the power to vary under JCT 80 follows the same formula, namely that "no variation ... shall vitiate this Contract." which on its face prevents the contractor from refusing to carry out the work under the contract or unlimited variations, but some limit there must be as where the power were used beyond anything that could conceivably represent a true variation within the provision.[68] Where that limit is depends on ascertaining the intent of the parties on the construction of the contract, for where the contract terms make detailed provision for the ordering and compensation for the effect of variations there is no ability to set it aside on the grounds of frustration or otherwise and seek reimbursement of a reasonable sum.[69]

The approach in France is different. For private works, the terms of AFNOR 91 set a limit on increases in the amount of the work in that the contractor's obligation is to carry out additional work provided the addition, assessed on the basis of the initial prices, does not exceed one quarter of the original contract sum.[70] Further, whilst separate agreement is always possible, if the increase exceeds the quarter the contractor is able to seek termination, *résiliation* , of the contract under an order of the court.[71] A detailed scheme also operates for public works under the CCAG whereby the facility of *résiliation* is not available and the contractor is entitled to indemnification where the additions amount to 5% under fixed price lump sum contracts; 25% under unit price contracts, and 50% under contracts based on cost.[72]

AFNOR 91 also sets a limit on decreases in the amount of the work that the contractor must bear without entitlement to claim in consequence, and this extends to a decrease in work, assessed on the basis of the initial prices, not

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[68] Keating on Buiding Contracts, 5th ed., at p. 493, gives the example of an instruction to build a block of flats under a contract for a single house.

[69] McAlpine Humberoak Ltd. v McDermott International Inc. (1992) 58 B.L.R. 1 (C.A.).

[70] AFNOR 91, article 8.1.1.1.

[71] AFNOR 91, article 8.1.1.3. Here *résolution* is, by the provisions of article 20.3, under Article 1184 of the Civil Code.

[72] CCAG, 1991 edition, articles 15.

exceeding 20% of the original contract sum.[73] If the decrease exceeds this then the contractor is entitled under the contract to claim compensation for expenses and for lost profit.[74] Where there is an increase or decrease in quantities of more than 25% flowing from changes in the nature of the work ordered by the employer and resulting from circumstances which are neither due to the fault nor making of the contractor, then the contractor has an entitlement to new prices for the work in question.[75]

In Italy the balance between employer and contractor in connection with the ability to vary is within the Codice Civile. The point is one of relief for the contractor. There are two qualifications in Article 1661 on the ability of the employer to order variations in the plans; first, they are permissible only within the general scope of the contract, and second they must not entail considerable modifications to the nature of the work, *notevoli modificazioni della natura dell'opera* , nor must the changes lead to significant deviation from the extent of the works contemplated under the original contract. Within these limits there is the additional bar against variations in that the value must not exceed 20% of the remuneration originally agreed and the contractor may seek adjustment of the contract price even though the original was a lump sum. Where variations, not being necessary variations within Article 1660, exceed the 20% limit the contractor may refuse to carry out the order although he remains obliged to execute the work according to the original plan and specification.[76] Under Article 1660 where in order to carry out the works acccording to the proper standards necessary changes are required beyond 25% of the original price then the contractor may withdraw from the contract and be indemnified for his expense. Equally there is a right of the employer to terminate the contract where the extent of changes necessary is considerable, *di notevole entita* ,

[73] AFNOR 91, article 8.1.2.1. For public works the figures for omissions are: 5% under fixed price lump sum contracts; 20% under unit price contracts, and 33.3% under contracts based on cost, CCAG, 1991 edition, article 16.

[74] AFNOR 91, article 8.1.2.2. Under common law the power to vary by omission does not extend to enable an employer to omit work fron the contract to give it or similar work to a different contractor. Two Australian authorities on this point of Carr v J.A. Berriman Pty. Ltd. (1953) 27 A.J.L.R. 273 and Commissioner of Main Roads v Reed & Stuart (1974) 12 B.L.R. 55 are regularly cited in England.

[75] AFNOR 91, article 8.1.3.2. This % is that applicable equally to public works, CCAG, 1991 edition, article 17.

[76] Attempts to oust this provision have been disapproved by the *Corte di Cassazione,* whereby general provisions, *clausola generale* , inserted with the intent of negating the contractor's right to claim additional remuneration under Article 1661 are void on the ground of illegality, Cass. 24th April 1968, no. 1331, mass. giust. civ. 1968, 670.

upon which cancellation the employer is liable for the indemnity.[77]

The civil law approach to limitation on the extent of variations is adopted in part in FIDIC namely in terms of compensation. Whilst the engineer is given wide authority to instruct variations their valuation, and that of the originally defined and measured works, is at the rates and prices in the contract,[78] unless all varied work and measurement adjustments taken together,[79] are in excess of 15% of the original contract price.[80] In this event an addition or deduction of such further sum as is agreed by the parties, or in default determined by the engineer, falls to be made, which sum is based on the difference over the 15%. In the third edition of FIDIC in 1977 the percentage had been reduced to 10% leading to its greater application before reversion to the current 15%.

Such clause has no counterpart in the English ICE Conditions, and, whilst criticised,[81] it does adopt a mechanism familiar in civil law jurisdictions. The calculation is provided to be done on the issue of the Taking-Over Certificate, and the 15% is a hurdle for adjustment of the remuneration. It is not a prohibition on variations beyond it. This points to the true balance in respect of variations being between the facility to require changes and a satisfactory

[77] This ability to terminate and indemnify against expenses for considerable necessary variations is contrasted with the uniiateral right of an employer to terminate under Article 1671, when the compensation is for expenses and loss of the contractor's profit.

[78] FIDIC, clauses 51.1 and 52.1. Instructions are not required for increases or decreases in quantities the result simply of the fact of them exceeding or being less than those in the bills of quantities, clause 51.2.

[79] The inclusion in the FIDIC 15% computation of measurement alterations is an important clarification. The point highlights the significance of the analysis of the essential features of lump sum, measurement and value and schedule contracts for determining what is a variation. This is also illustrated by Arcos Industries Pty. Ltd. v Electricity Commision of New South Wales (1973) 12 B.L.R. 63 (Supreme Court of N.S.W.). Declared as a Schedule of Rates contract, payment was to be made for the actual quantities measured, and quantities given were "approximately correct" with no guarantees as to the quantities or responsibility for them. The works were subject to "extras, additions, deductions, enlargements, deviations, alterations, substitutions and omissions", but without the approval of the contractor the total value of omissions to the works was not to exceed 10% of the contract price, which was defined as the total value of the work exclusive of the value of "extras ... etc.". The quantities of earth and concrete works fell short of the estimated quantities by in excess of 10%, and the contractor claimed that such was an omission made without his approval. The conclusion was that although the nature of the work was certain its extent was not, and that as variations in levels and dimensions were integral to a schedule of rates contract the total value of the work, being the contract price, was not the estimated value derived from the approximate quantities but the true value of the work of the nature agreed to be done. The provision for variations and their restrictions were thus concerned with changes in the nature not in the quantities of the work.

[80] FIDIC, clause 52.3. Expenditure under provisional sums and dayworks, and cost resulting from the application of price adjustment formulae or the impact of subsequent legislation are excluded from the computation.

[81] I. N. Duncan-Wallace, The International Civil Engineering Contract, p. 105.

means of compensating the contractor, whose business and aim after all is the execution of works for proper remuneration. This is upset only where the ability to vary represents a perceived unreasonable economic imposition on the contractor. The restriction of variations to percentages of the contract price may in reality be more heavy handed than an unrestricted approach, particularly where termination is an option, provided always that appropriate measures exist for achieving proper remuneration. Such potential imposition as would derive from the lack of restriction in England is substantially ameliorated under JCT 80 by the application of the rules for revaluation not just to the varied work, but, by amendment from the 1963 edition, to other work beyond that varied where the variation has substantially changed the conditions under which that other work is executed,[82] and also by provision for payment of "direct loss and/or expense" incurred by the contractor for disturbance to the regular progress of the works by instructions requiring a variation where he would not be reimbursed by payment under any other clause.[83] Movement towards this is seen in the alteration of terms in AFNOR as between the previous and the 1991 edition.

[82] JCT 80, clause 13.5 and in particular 13.5.5.

[83] JCT 80, clauses 26.1 and 26.2.7.

The achievement of completion is taken as the end and aim of a building contract representing the conclusion of the contractor's obligation as to performance of the work, providing both the dividing line for risk, and rights to payment. English law admits of degrees of completion by reference to the concepts of the entire contract and the evolution of substantial completion. The process is one of determining the intention from the construction of the parties' contract, and the term "practical completion" has been in the RIBA/JCT forms since their inception. ICE 91 uses "substantial completion" but again as a term internal to the operation of the contract.

Acceptance of the work, *réception* , is a civil law concept deriving from the impact under Roman law of approval which was critical to the transfer of risks in the work and the right to payment. Described as "*une opération contradictoire* "[1] it was by historical use intended to accord a final discharge of the contractor in respect of the satisfactory performance of the work so that after completion, followed by inspection and approval of the work by the employer there is a signing off, normally in writing, and the contractor no longer carries liability for defects, except those that are hidden, *vices cachés*. As a principle *réception* is part of the framework of French law and the Code Civil in relation to the obligations under it, and is not a matter for choice by the parties as to its use.

Acceptance was one of the areas of the GAIPEC investigation, and its recommendation closely followed the French model; that acceptance be a

[1] G. Liet-Veaux, le Droit de la Construction, 9th Edition.

unilateral act imposed by law, irrespective of the terms of the parties' contract, and representing an agreement as to completion of the contractual obligations and that the building is ready for use and occupation. The Discussion Paper raises questions as to difficulties of application and consequences that illustrate the necessity for an appreciation of civil law principles associated with it, and which themselves mirror disputes under English law as to what represents substantial completion, and whether it or practical completion has been achieved.[2]

1 Practical Completion - JCT 80

Under JCT 80 the contractor's express obligation is to "complete" the works on or before the "completion date",[3] but despite this term it is to complete the works by that date in the sense that "practical completion" is used.[4] By clause 17.1 the achievement of practical completion is made the subject the opinion of the architect. When of that opinion he is obliged to issue a certificate to that effect, and practical completion is then deemed to have taken place on that named date for all the purposes of the contract. Those purposes include;[5] the times for the commencement of the defects liability period[6] and the period of final adjustment of the amount to be paid as the Contract Sum,[7] and for the release from the insuring obligation,[8] and of the first part of the retention.[9]

Practical completion of the works is a matter of recognition decided independently, in that by that mechanism the parties are committed to an opinion of the architect who, although engaged by the employer,[10] must form

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[2] EC, The Commission Staff Discussion Paper, Concerning Possible Community Action With Regard to Liabilities And Guarantees In The Construction Sector, June 1993.

[3] Clause 23.1, defined to include any extension of time.

[4] J. Jarvis & Sons Ltd. v Westminster Corporation (1969) 1 W.L.R. 1448 at 1458 (C.A.); a decision on the 1963 Edition and (1970) 1 W.L.R. 637 (H.L.).

[5] It ends the contractor's primary right and obligations to carry out works, including variations, and the period in respect of which any liquidated damages may be payable. It also is the date after which the employer may assign the right to bring proceedings in his name (Clause 19.1.2).

[6] Clauses 17.2 and 17.3.

[7] Clause 30.6.

[8] Clause 22, Insurance of the Works.

[9] Clause 30.4.1.2 in conjunction with clause 17, and ultimately the whole of the retention.

[10] An employer is in breach if he does not have an architect in place to perform the function; Croudace Ltd. v London Borough of Lambeth (1986) 33 B.L.R. 20 (C.A.).

and act on it independently,[11] albeit not as arbitrator, and exercising professional skill. Despite the contract not defining the meaning of practical completion it can been collected from other terms that give it purpose; so that the extent of the requirement for practical completion is derived from the presence or absence of contractual obligations for work after that date:

> "... what is meant is the completion of all the construction work that has to be done ... After practical completion (the contractor) may be required to make good any defects, shrinkages or other faults which appear in the defects liability period ...
> ... (it) is provided in order to enable to those defects which are not apparent at the date of practical completion to be remedied. If they had been then apparent, no such certificate would have been issued.
> It follows that a practical completion certificate can be issued when owing to latent defects, the works do not fulfil the contract requirements and that the contract can be completed despite the presence of such defects."[12]

The "construction period"[13] must therefore continue until the works are done without patent defect, and practical completion is not achieved if patent defects exist; but it was expressed that it could not mean "completion down to the last detail, however trivial or unimportant" for that would constitute the provision for liquidated damages a penalty.[14] This has been applied in relation to "practical", permitting certification where there are very minor items of deficiency, being *de minimis* .[15]

The same mechanism applies if different dates are provided for completion in sections, but the parties are able themselves to take the matter out of the hands of the architect if the employer wishes to take possession of any part(s) of the works, and where the consent of the contractor, which must not be unreasonably withheld, is obtained,[16] in which case practical completion is deemed to have taken place.[17]

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11 Sutcliffe v Thackrah (1976) A.C. 727 (H.L.), particularly per Lord Reid at 737.

12 J. Jarvis & Sons Ltd. v Westminster Corporation (1970) 1W.L.R. 637 (H.L.) per Viscount Dilhorne at 646.

13 Kaye (P. & M.) Ltd. v Hosier & Dickinson Ltd. (1972) 1 W.L.R. 146 (H.L.), per Lord Diplock at 165.

14 J. Jarvis & Sons Ltd. v Westminster Corporation (1969) 1 W.L.R. 1448 (C.A.) per Salmon L. J. at 1458 .

15 H. W. Nevill (Sunblest) Ltd. v Wm. Press & Son Ltd. (1981) 20 B.L.R. 78 at 87.

16 Clause 18.1, Partial possession by Employer.

17 Provision is made by clause 18.1.1 to .4 for that date to be applied for defects liability, insurance, retention and liqidated damages purposes and adjustments.

Under ICE 91 the works required to be completed "shall be completed within the time so stated".[18] By clause 48 (1) it is for the contractor when he considers that the whole of the works[19] has been substantially completed to give notice to the engineer, and such notice is to accompanied "by an undertaking to finish any outstanding work in accordance with the provisions of clause 49 (1)."[20] The parties will be taken to have contemplated less than the finished work as requisite for substantial completion, and certainly not limited to *de minimis* matters; the time for them to be done, if not specified by the contractor in his undertaking after agreement between engineer and contractor, being "as soon as practicable" during the "Defects Correction Period".[21]

The nature of engineering as opposed to building works is inherent in the approach. Substantial completion is more likely to be associated with the operation of the works after testing, nevertheless completion is less distinct because of the continuing obligation in Clause 49 (2) to "deliver up to the Employer the Works ... as soon as practicable after the expiry of the, ... Defects Correction Period in the condition required by the Contract (fair wear and tear excepted ...". There is no bar to substantial completion by the existence even of patent defects or the need for changes, for, to the end of such delivery up and apart from the ability to defer remedying them within his undertaking to finish outstanding work, the contractor is to "execute all work of repair amendment reconstruction rectification and making good of defects of whatever nature as may be required of him ... during the ... Defects Correction Period ...".[22]

It is for the engineer to issue a Certificate of Substantial Completion stating

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[18] Clause 43, Time for Completion.

[19] Or any Section in respect of which a separate time for completion is provided.

[20] Clause 49 (1), Work outstanding: " The undertaking to be given under clause 48 (1) may after agreement between the Engineer and the Contractor specify a time or times within which the outstanding work shall be completed. If no such times are specified any outstanding work shall be completed as soon as practicable during the Defects Correction Period."

[21] Clause 1 (1) (s), Definitions: "... stated in the Appendix to the Form of Tender calculated from the date on which the Contractor becomes entitles to a Certificate of Substantial Completion ...". In engineering contracts it is unusual to be less than 1 year, and for some elements may be 2 years.

[22] Clause 49 (2), Execution of work of repair etc..

the date on which in his opinion the works were substantially completed "in accordance with the Contract" (including therefore the provisions as to outstanding work) or instructions as to work that in his opinion requires to be done before such certification.[23] Further, by Clause 49(4), and separate from certification where the contract requires completion by section,[24] if the engineer considers that "any part of the Works" has been substantially completed and has passed any prescribed final test he may issue a certificate in respect of that part.[25] This is separate again from use and occupation of the works by the employer. Some is contemplated without impact, for only if it is of a "substantial part" may the contractor request and the engineer "shall" certify for that part.[26]

Foreign to civil law eyes, such discretion, as in JCT 80, is ripe for dispute with liquidated damages dependent on the date certified,[27] but it is magnified under ICE 91 as to the extent of "outstanding work" to be accepted. These prevalent English forms permit though of challenge to the date certified and by their arbitration clauses give power to the arbitrator "to open up, review and revise" any certificate, opinion and decision of the architect or engineer.

3 *La Réception*

Whilst it has always had its application under French law, *réception* was specifically introduced into the Code Civil provisions in amendments in 1967 to Articles 1642-1 and 1646-1, and it was given additional functions and significance in France in the law of 4th January 1978 introducing the new elements of Article 1792. Vitally, the decennial guarantee liability under

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[23] Clause 48 (2), Certification of substantial completion; the engineer is given 21 days from receipt of the contractor's notice to issue the certificate or the instructions for work required to be done If instructions are given the contractor is entitled to the certificate "within 21 days of completion to the satisfaction of the Engineer of the work specifed ...".

[24] By its definition in clause 1 (1) (u), a "Section" requires to be identified.

[25] "Any part of the Works" is neither defined nor limited. The issue of a certiicate for such part deems the contractoor to have undertaken to complete any outstanding work in that part. By the proviso to Clause 49 (1) liquidated damages are reduced by reference to the value of the part agaisnt the whole.

[26] Clause 49 (3), Premature use by Employer; again, the contractoor is deemed to have undertaken to complete any outstanding work in that part.

[27] Previous editions of the I.C.E. Conditions used the term "maintenance" which may have easier to apply.

Article 1792 is applicable where *réception* has taken place.[28] The extent or nature of the procedures as to *réception* which parties may introduce remain the subject of debate, especially where these could impinge on the application of the principle,[29] and they are essentially similar to those referred to in the Discussion Paper.

Article 1792-6 al. 1 provides[30] that *réception* is the act by which the employer declares his acceptance of the work, with or without reservation; taking place on the application of either party, either amicably or in default by operation of law, and judicial determination. The parties' contracts ordinarily have provisions relating to *réception* and although it seems there was a school of thought that regarded the law as to *réception* as not susceptible to amendment by contract, the practice appears not to follow this. Article 1792-6 has been held not to exclude the possibility of tacit acceptance,[31] which has always been one of the exceptions to the normality of a written record. Further, taking possession of itself is insufficient to characterise the requisite unequivocal volition of the *maître d'ouvrage* to accept the works.[32]

Article 1792, with the expressed effects in Articles 1792-6, 1792-3 and 2270 of bringing about the commencement of the periods for repairing defects notified, or reserved matters, and the two and ten year liabilities respectively,[33] does not reduce the need to appreciate previous operational rules, rather it raises new issues for consideration. The development of the concept of *réception* over the years, and the importance of the discharge of liability accompanying it, had led to a division into provisional and definitive acceptance, *réception provisoire* and *définitive* , and in public works contracts there remains the requirement for both types of *réception* . Minor defects, imperfections in details or minor work not done need not

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[28] Civ. 3, 12 th January 1982, D. 1991-2. Bull. civ. III, no. 8.

[29] M-A. & P. Flamme, le Droit des Constructeurs, 1984. G. Liet-Veaux, Réception des Ouvrages. (1979) Gaz. Pal. 2. Doctr. 414 .

[30] Article 1792-6, al. 1: *"La réception est l'acte par lequel le maître de l'ouvrage déclare accepter l'ouvrage avec ou sans réserves. Elle intervient à la demande de la partie la plus diligente, soit à l'amiable, soit a défaut judiciairement. Elle est, eu tout état de cause, prononcée contradictoirement."*

[31] Civ. 3, 12th October 1988, Bull. civ. III, no. 137; D. 88. IR. 246. Tacit acceptance, *la réception tacite* , may come about: Versailles, 4th December 1987, D. 1989. 139, note Karila.

[32] Civ. 3, 4th October 1989, Bull. civ. III, no. 176; Gaz.. Pal.1990. 1. Somm. 214, obs. Peisse.

[33] And in consequence the identification of the end of the limitation periods.

prevent provisional acceptance, but the fundamental effect of final acceptance provides the discharge for the contractor.

The prime function from the origins of *réception* is preserved in the sense that there is scope for its operation outside those defects and circumstances that fall within Articles 1792 and 2270, so to exonerate the contractor from liability for apparent defects which were not reserved. Dispute is likely where the greatest care is lacking in formal reservations from *réception* , and also in respect of the nature of hidden defects not the subject of release in their relationship with such defects as were apparent yet not reserved. It is for the *juges du fond* within their jurisdiction as to fact to decide whether the particular defect affecting the building was or was not known to the *maître d'ouvrage* at the time of *réception definitive* .[34] Strict limits have however been placed on the concept of a visible defect so that it is visible only if it can be detected by a laymen. Defects are regarded as hidden either if the causes of the problem could not be determined at the time of *réception* , or if serious consequences affecting the soundness of the structure appear only after acceptance.

Article 1792-6 al. 2[35] provides a guarantee of satisfactory completion, *garantie de parfait achèvement* . By this the contractor is bound for the period of one year, adopting *réception* as its commencement. This guarantee extends to the remedying of all defects identified by the employer, whether those reserved matters referred to in the report at the time of *réception* , or by written notification of those which come to light after *réception* . To English eyes this is a statutory defects liability period. It may however have an effect of making an employer less reluctant to agree to *réception*, for with the obligation on the contractor to remedy all deficiencies, whether reserved in the report of *réception* and thus necessarily apparent, or whether revealed after it within the year, the traditional formalities, procedures and impact appear less significant on this count. The effect of *réception* is that reservation as to any defect at that stage renders the decennial guarantee

[34] Civ. 3, 3rd November 1983, Gaz. Pal. 1984. 2577, note Liet-Veaux.

[35] Article 1792-6 al. 2: *"La garantie de parfait achèvement, à laquelle l'entrepreneur est tenu pendant un délai d'un an, à compter de la réception, s'étend à la réparation de tous les désordres signalés par le maître de l'ouvrage, soit moyen de réserves mentionnées au procès-verbal de réception, soit par voie de notification écrite pour ceux révélés postérieurement à la réception"*.

inapplicable to it on the grounds that it then comes within the *garantie de parfait achèvement* . This though is ameliorated in that even where defects are noted at the time of *réception* but their full extent was not apparent, the *Cour d'Appel* has decided that there is no bar to their constituting defects susceptible to the decennial guarantee.[36] The provisions of Article 1792-6 are not exclusive of Articles 1792, 1792-2 and 1792-3 for the *maître d'ouvrage* may pursue the contractor under the decennial guarantee for those defects within its scope revealed in the year after *réception* .[37]

Article 1792-6 al. 3 provides that the times necessary for the carrying out of the remedial work are to be agreed by the employer and contractor,[38] but, by Article 1792-6 al.4,[39] in the absence of such agreement or in the event of failure to execute them within the time provided, the works may, after due notice, be carried out by the employer at the expense and risk of the contractor in default. Under Article 1792-6 al. 5[40] the requirements under the *garantie de parfait achèvement* , by way of the execution of works, are for the agreement of the parties, but in default determined judicially. The guarantee does not, by Article 1792-6,[41] extend to work required to remedy the effects of fair wear and tear, and use.

4 AFNOR 91

The distinction between the parties' freedom to adopt their own scheme for closing down their relationship, as in JCT 80 and ICE 91, and the imposed concept of *réception* is seen in the AFNOR provisions. Following the Code,

[36] Civ. 3, 10th January 1990, Bull. civ. III, no. 6; Gaz. Pal. 16-18th December 1990, Somm., obs. Peisse.

[37] Civ. 3, 4th February 1987, Bull. civ. III, no.16.

[38] Article 1792-6 al. 3 : *"Les délais nécessaires à l'exécution des travaux de réparation sont fixés d'un commun accord par le maître de l'ouvrage et l'entrepreneur concerné".* [The time necessary for the execution of the works of repair are fixed by the agreement of the employer and the cntractor.]

[39] Article 1792-6 al. 4: *"En l'absence d'un tel accord ou en cas d'inexécution dans le delai fixé, les travaux peuvent, après mise en demeure restée infructeuse, être exécutés aux frais et risques de l'entrepreneur défaillant."* [In the absence of such agreement or in the event of failure to execute them within the time provided, the works may, after due notice, be carried out at the expense and risk of the contractor in default.]

[40] Article 1792-6 al. 5: *"L'exécution des travaux exigés au titre de la garantie de parfait achèvement est constatée d'un commun accord, ou, à défaut, judiciairement."* [The execution of the works required under the *garantie de parfait achèvement* is to be determined by agreement , or in default by judicial proceedings.]

[41] Article 1792-6 al. 6: *"La garantie ne s'étend pas aux travaux nécessaires pour remédier aux effets de l'usure normale ou de l'usage."* [The guarantee does not cover work necessary to remedy the effects of ordinary wear or use]

réception is stated as the act by which the employer declares his unqualified acceptance of the work,[42] with its date providing the starting point for the liabilities and guaranties under Articles 1792, 1792-2, 1792-3, 1792-6 and 2270, and occurring either by mutual agreement or by judicial decision. Unlike contracts in the public domain provisional acceptance is ouste. It is a final, once-only event, *définitive en seule fois* ,[43] and follows its origins of discharging the contractor from all of his contractual obligations, but with the expressed exception consistent with Article 1792-5 of those imposed by the Code.[44]

Where the works are carried out by *entrepreneurs groupés* the request for *réception* must be by the authorised agent of all the contractors, and in the same manner as for separate or general contractors.[45] *Réception* may not be requested until all of the work to be carried out by the *entrepreneurs groupés* , or where *separés* or *général* the work of that contractor, has been completed, unless the contract documents have provided for acceptances of parts, *réception partielles* , whether individual buildings or elements of the works.[46]

The importance attached to *réception* as a process under law, and that its first mode is agreement, is reflected in the provisions bringing the parties together to effect it. Inspection for agreement on *réception* requires positive action by the employer, who must specify the date for inspection within fifteen days from receipt of the contractor 's request, with the date not more than twenty days from it.[47] Failure in this, or failure to attend the inspection or be represented entitles the contractor to serve formal notice requiring the fixing of the date under the same time scheme; continued failure enables the contractor to have that fact recorded and served by court official, *huissier de justice* . Thereafter the employer has thirty days to comply, failing which,

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[42] Article 15.1.1 to 15.1.4.

[43] Article 15.1.1. This is identified in Article 1.3.2.2.4 as one of the special characteristics of this contract form.

[44] Article 15.1.2.

[45] Article 15.2.1.1.1; the requirement is to give notice to the employer by registered letter with recorded delivery, with a copy to the employer 's agent, that the works may be taken over from a fixed date which must fall between the 8th and 15th day following the date of posting of the request, unless the Employer agrees to an earlier date.

[46] Articles 15.2.1.1.2 and 15.2.1.2.2.

[47] Articles 15.2.2.1.1 and .2. This period may be extended to take account of paid public holidays.

réception is deemed to have taken place, unqualified by any reservations, on the date of receipt of the formal notice.[48]

At the conclusion of the inspection, which becomes the material date,[49] the employer must give his decision, being one of refusal or acceptance, with or without qualification,[50] and the report prepared by the employer's agent must be signed by the employer and provided to the contractor forthwith, or notification given within five days.[51] Following this the contractor has twenty days to dispute any reservations by service of formal notice, failing which he is deemed to have accepted such reservations.[52]

Where the report makes reservations by reason of omissions or imperfections it must identify them, and require remedies, and unless otherwise agreed the contractor has ninety days to correct them, and then request their withdrawal.[53] A refusal of *réception* is justifiable only on grounds that the work is not finished or that the extent of defects is such as to equate to a failure to complete, or which necessitate re-doing works, and the same procedure for resolving disputes applies, but, generally, where it is impossible to achieve *réception* by agreement the decision is for the court.[54]

AFNOR 91 also provides that entry into possession is at the time of *réception*, but this does not apply where the time for completion has passed exclusively through the contractor's fault and the employer wishes to take possession.[55] The *garantie de parfait achèvement* under the contract,

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48 Article 15.2.2.1.3.

49 Whether of *la réception* or of refusal; Article 15.2.3.2.

50 Article 15.2.3.1.

51 Article 15.2.3.3. The report, *le procès-verbal*, is as referred to in Article 1792-6 al. 2.

52 Article 15.2.3.4. Article 19 contains the provisions as to Disputes, *Contestations*. Article 19.1 enables either party to give formal notice of failure to abide by the terms of the contract requiring compliance within a period not less than 15 days, unless provided otherwise in the special conditions. Arbitration is not compulsory; for by Article 19.2 the parties are required to consult as to whether to submit their dispute to arbitration or not. Unless otherwise stipulated by the special conditions disputes that are not able to be resolved by arbitration are, by Article 19.3, to be brought before the court having jurisdiction over the place of performance of the work.

53 Articles 15.2.5.1, .2, .3, .4 and .5. The contractor's request must be by recorded delivery. Failing correction by the contractor and after formal notice the employer may have the necessary work done at the expense and risk of the contractor. In the absence of agreement on any of these matters within 30 days the dispute is to be settled pursuant to Articles 19.2 and 19.3.

54 Articles 15.2.6 and 15.3.

55 Articles 15.2.4.1 and .2. In this event inspection of the work before taking possession must take place not less than 15 days after formal notice has been given to the contractor to complete; a detailed survey is to be prepared and given to the contractor; and the employer may then enter into possession andarrange for final completion.

expressed as irrespective of Articles 1792 to 1792-3 and 2270, follows the requirements of Article 1792-6.[56]

5 *Réception* outside France

Belgium did not introduce the equivalent of the 1978 Loi Spinetta, and, with the original text of Article 1792,[57] and with no provision in any code, or in the legislation protecting purchasers of dwellings to be constructed,[58] that defines *réception* , its *jurisprudence* , procedures and effects are much debated on questions of form and timing, tacit acceptance, and on the necessity for provisional and definitive acceptances.[59] The principle of the legally binding act of a declaration by the employer is fundamental, but it is the effect of the agreement that provides controversy.[60]

In Germany, in contracts under the VOB[61] conditions there are specific provisions constituting amendments to the BGB code, including provisions as to acceptance of the work, so that it may be governed by the BGB or the VOB conditions. When governed by the BGB and whether the contract is for work or for services, acceptance may be written or inferred, including from taking possession, and reservations are essential because of the four-fold impact of acceptance whereby: risks are transferred from the contractor to the owner; the burden of proof in the event of defects in the work is reversed from the contractor to the owner; the end date of the warranty period which the law provides for the owner is by reference to the date of acceptance; and,

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[56] Articles 16.1 to 16.5. It provides a time limit for rectification of notified defects of 60 days.

[57] Article 1792, original form, [If a building built for a lump sum price fails wholly or in part through a defect in construction, even through a defect in the ground, the architect and contractor shall be liable for 10 years.]

[58] Loi Breyne of 9th July 1971 and Royal Decree of 21st October 1971.

[59] M-A. & P. Flamme, Le Droit des Constructeurs, 1984.

[60] *La réception provisoire* does not by itself give the degree of agreement of the type required for the commencement of the ten year prescription period. By it the parties are not taken to have derogated from the custom that provisional acceptance only constitutes a first stage towards the requisite agreement; Cour de Cassation, 4th March 1977, J.T. 621, obs. Bruyneel.

[61] Verdingungsordnung fur Bauleistungen; the conditions applicable to construction work which were negotiated with the building industry and which are compulsory for government contracts and frequently incorporated into private contracts

the contractor is given the right to receive all contractual remuneration.[62]

Acceptance is equated with conformity by the contractor with the contract, and taking possession within the contract is regarded as tacit acceptance so that even early possession forced on an owner requires explicit rejection of acceptance. Defects are those known, not hidden, and, regarded as a conscious act of the owner, the effect of acceptance without reservation is the loss of the rights to secure repair of the defects, or reduction in the price,[63] but not to the right to damages.[64] Reservations must be made at the time of acceptance, not before or afterwards, but whilst this may appear to require a positive approach of the owner the initiative to achieve acceptance rests firmly with the contractor.

The impact in Germany of acceptance and the necessity for knowledge creates problems as to intermediate examination of work or examination on its completion. There appears less of the concern apparent in France towards protection of the owner and his treatment as a layman,[65] and whilst German law does not start out with a duty of examination of the work except where both parties are in the business, failure to examine and lack of notification gives rise to deemed approval, albeit such approval, whether tacit or express, covers only those defects which ought to have been discovered upon acceptance and upon proper examination of the work.[66]

The effect is that close attention to inspection is required to avoid the pitfalls

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[62] BGB ¶¶ 640; E. J. Cohn, Manual of German Law. BGB ¶¶ 640 provides that the employer is bound to accept the work completed in accordance with the contract, as long as acceptance is not rendered impossible by reason of the nature of the work. If the customer accepts defective work, despite being aware of it, he only retains the rights conferred by ¶¶ 633 and ¶¶ 634 if reservations as to the defects are made at the time of acceptance. BGB ¶¶ 633 and 634 enable an employer to fix a period for the removal of defects that destroy or diminish the value of the work or its fitness for its ordinary or stipulated use. In default the employer may himself remove the defect and claim compensation.

[63] Approval of the work, whether express or implied by law, operates as a waiver of all contractual rights otherwise available in the case of delivery of defective work. This does not amount to a waiver of tort in the case of personal injury suffered as a result of such defects.

[64] BGB ¶¶ 635 provides that if the defect is caused by a circumstance for which the contractor is responsible, the employer may demand compensation for non- fulfillment, instead of cancellation or reduction of the price, under ¶¶ 634.

[65] The reception of and development of the Roman law in Germany through the Pandectist School was central to the approach to the drafting of the BGB with the view of the typical citizen not as an artisan but as a monied entrepreneur or landed proprietor, with business experience, capable of succeeding in a society with freedom of contract and able to take his own steps to protect himself.

[66] Defects fraudulently concealed are not covered by the rule, but the employer is obliged to give notice immediately after they have become manifest, BGB ¶¶ 370 - 1, and ¶¶ 370 - 3. Under Swiss law the employer is obliged to examine the work delivered to him as soon as feasible in due course of business and notice of defects must be given.

of acceptance. The BGB rules may be amended by agreement, in particular where general conditions such as the VOB conditions apply. Under these, acceptance is more onerous for the owner, for, unless otherwise agreed, it is deemed to take place within twelve days following written notification of completion of the work, and taking possession gives rise to acceptance at the expiration of six days.[67] The VOB conditions are used in a majority of building contracts in Germany and with the propensity towards use of several contracts between owner and various contractors engaged in a project, as opposed to one main contractor, successive acceptance of parts is usual.[68]

6 English Law

Acceptance and Substantial Performance

As the end of the contractor's obligation of a contractor to perform the basic work and supply of materials under a building contract, parts of the doctrine of *réception* are recognisable in English law in the principle of substantial performance, without the necessity for consideration of standard conditions providing for certification and its consequences. However, it is without act of the employer that substantial performance impacts on the parties so as to

[67] VOB conditions Article 12: "1. If a contractor requests acceptance after construction work has been completed the client shall have 12 working days in which to effect this. Any period may be agreed. 2 Special acceptance may be given for the following, on request: a) isolated parts forming a whole, b) parts on which continuance of the work is dependent. 3. In the event of a substantial defect accceptance may be refused until repairs are made. 4. Formal acceptance shall take place when one of the contracting parties requires it. Each party may then have recourse to an expert at its own expense. The expert's report is to be put in writing after joint negotiation. The report must record any reservations relating to known defects and to penalties, and any objections by the contractor. Each party is to receive a copy. 5. When one of the contracting parties is freed from his obligations with respect of paragraphs 2, 4 or 4 above, this discharge shall also apply to their legal representatives and their subcontractors, except where the latter have acted with intentional or gross negligence. 6. If a third party claims against one of the contracting parties for any loss for which the second contracting party is responsible by virtue of paragraphs 2, 3 or 4, the former may request that the latter release him from his obligations with regard to third parties. He must not accept or satisfy claims by third parties without first providing the other party with an opportunity of being represented."

[68] The Italian *Codice Civile* expressly links the right of the contractor to payment with acceptance and embodies the owner's right and his obligation to check completed works as provided in Article 1665: "Verification and payment for the works. The Owner, before receiving delivery of the works, has the right to verify the completed works. The verification must be made by the Owner as soon as the contractor makes it possible for him to proceed with it. If, notwithstanding the installation of the contractor, the Owner delays his verification without justifiable grounds, or does not communicate within a short period of time his findings, the works are considered accepted. If the Owner takes delivery of the works without reservation, this is considered as an acceptance even if verification has not taken place. Unless otherwise agreed, or by contrary custom, the contractor has the right to payment of the consideration when the work is accepted by the Owner."

give rise to the right of the contractor to receive his contractual remuneration, and it is in this context that the principle developed. This though is only one aspect of the function of *réception* , for while in that context substantial completion constitutes an acknowledgment at law of the discharge of the contractor it is only discharge from any requirement for further performance in order to recover the contract price. Substantial completion under English law does not release the contractor from the consequences of any failure to perform or complete fully in respect of his pre-existing contractual obligations, in that the employer may have recourse to them to establish breaches of contract and so recover damages, or to diminish the price. When achieved, substantial completion places the burden on the employer to assert and prove any breach and starts time running in ordinary circumstances for the purposes of the Limitation Acts, and transfers risks in and from the works from the contractor to the employer.

The impact of an entire contract in English law, under which complete performance of the building contract is required before the right to payment arises,[69] is reduced by the application of the concept of substantial performance, where substantial benefit short of that complete performance has been conferred on an employer.[70] This has been equated to acceptance in the sale of goods,[71] but although the circumstances of possession and benefit ordinarily associated with substantial performance are used to provide a mechanism for securing payment in building contracts, and can be seen in comparison and contrast with events that may constitute *réception tacite* under *jurisprudence* , they alone cannot properly found a principle of acceptance with the full rigour of *réception* .

Where building work is carried out on the land of an employer, and so

[69] Cutter v Powell (1795) 6 Term. Rep. 320.

[70] Considered under Réception and Payment.

[71] Hoenig v. Isaacs (1952) 2 All ER 176, per Lord Denning, M.R. at 181: "Just as in a sale of goods the buyer who accepts the goods can no longer treat a breach of condition as giving a right to reject but only a right to damages, so also in a contract for work and labour an employer who takes the benefit of the work can no longer treat entire performance as a condition precedent, but only as a term giving rise to damages."

attached, it becomes the property of the employer.[72] Acceptance inferred from receipt and use of goods or failure to reject is not a valid basis for utilising the principle as in the sale of goods. At the origins of the doctrine of substantial performance the inference that had to be made to secure payment for the uncompleted part of the work under an entire contract was of a new contract,[73] but:

> "Where, as in the case of work done on land, the circumstances are such as to give the Defendant no option whether he will take the benefit of the work or not, then one must look to other facts than the mere taking the benefit of the work in order to ground the inference of a new contract..... The mere fact that a Defendant is in possession of what he cannot help keeping, or even has done work on it, affords no ground for such an inference."[74]

Whilst it was at one time suggested that there was a doctrine of acceptance applicable to building contracts in English law there is little to support this.[75] The central feature is that a building owner does not accept work by resuming or continuing in possession of the land on which the work is done:

> "Indeed, the term, 'taking possession' is scarcely a correct one. The owner of the land is never out of possession while the work is being done. But, using the term in a popular sense, what is he under the supposed circumstances to do? The contractor leaves an unfinished or ill-constructed building on his land; he cannot without expensive, it may be tedious, litigation compel him to complete it according to the terms of his contract; what has been done may show his inability to complete it properly; the building may be very imperfect, or inconvenient, or the repairs very unsound, yet it may be essential to the owner to occupy the residence, if it be only to pull down an replace all that has been done before."[76]

There are circumstances where use and occupation do give rise to substantial performance, and where acceptance occurs so as to render payment appropriate without substantial performance, but this does not deprive an

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[72] When materials are brought onto the site by the contractor they remain, subject to contrary terms, his property until affixed to the land by being built into the works, Tripp v Armitage (1839) 4 M. & W. 687. "Materials provided by the buider and portions of the fabric, whether wholly or partly finished, although intended to be used in the execution of the contract, cannot be regarded as appropriated to the contract or as "sold" unless they have been affixed to or in a reasonable sense made part of the corpus ...", Seeth v Moore (1886) 11 App. Cas. 350 (H.L.), per Lord Watson at 381.

[73] Appleby v Myers (1867) L.R. 2 C.P. 651.

[74] Sumpter v Hedges (1898) 1 Q.B. 673 (C.A.), per Collins L.J. at 676.

[75] Editions previous to the 9th and (current) 10th of Hudson's Building and Civil Engineering Contracts had suggested the doctrine, but analysis by Professor Duncan Wallace showed it not to be so.

[76] Munro v Butt (1858) 8 E. & B. 738 per Lord Campbell C.J.

employer of his right to seek damages for defects, and this is true where the employer pays the contractor in full.[77] This is not at odds with *réception* to the extent of the question of payment as it presupposes purported completion, as with "a building built" within Article 1792 of the Code Civil or a notification of completion within the German VOB conditions, but it does highlight a potential dissimilar result stemming from possession without reservation. The basis for the principle in English law that payment is no bar to subsequent action lies in the very nature of the building contract that defects may not be apparent at the time when those features exist that may amount to substantial performance and so require payment. The principle extends even to payment under a judgment, with the reason expressed in *Davis v Hedges*:[78]

> "The hypothesis, is that the plaintiff suing for the price is in default. The conditions on which he can bring his action are usually simple and immediate. The warranted chattel has been delivered, or the work contracted for has been done, and the right to bring an action for the price, unless there is some stipulation to the contrary, arises. On the other hand, the extent to which the breach of warranty or breach of contract may afford a defence is usually uncertain; it may take some time to ascertain to what amount the value of the article or work is diminished by the plaintiff's default. It is unreasonable therefore, that he (the plaintiff builder) should be able to fix the time at which the money value of his default shall be ascertained. In many cases the extent to which the value of works may be diminished by defect in their execution may be altogether incapable of discovery until some time after the date for payment has arrived. Surely the right to redress for the diminution of value, when discovered, ought not to depend on the accident whether the contracting party in the wrong had or had not issued a writ for the price."[79]

On these grounds, and consistent with the independence of the covenant to complete in accordance with the contract from that of payment, the fact that the employer had the ability to utilise the existence of breaches in diminution of the price claimed and recovered even by action was held not to deprive the employer of the right to damages, and this applies to payments on account or interim certificates.[80] The heritage of *réception* in civil law

[77] Considered under Réception and Payment.

[78] Davis v Hedges (1871) L.R. 6 Q.B. 687.

[79] Hannen J. at 690.

[80] Cooper v Uttoxeter Burial Board (1864) 11 L.T. 565.

inevitably governed French law in its development of the post-*réception* guarantee, for otherwise the abrogation of its nature so as to permit an action on the contract obligations throughout the limitation period as in English law would have destroyed the other elements of the transfer of risk and the right to payment.

Acceptance and Approval

The requirement that work be carried out and materials supplied to meet an approval has been a feature of the history of the building contract in England, and it remains in the standard forms. Unusually, that person is the employer himself,[81] in which case the approval will override any other provision or standard as to the work and the employer will indeed bar himself from action for defective work.[82] This was the result in *Bateman v Thompson*,[83] where the work was to be done with the best materials and also to the satisfaction of the architect and of the employer, for whom there was an express right to recover for defects discovered within twelve months. The architect certified his satisfaction which was binding, and the employer as was held, expressed his satisfaction by payment following such certificate. The converse, namely that an employer's approval is a condition precedent to payment, does not however follow.[84]

Where the work is required to the approval or satisfaction of an independent third party then it depends on the terms of the contract as to whether and when that approval becomes binding.[85] Express words such as "the certificate of the engineer ... shall be binding and conclusive on both parties"[86] are used, but generally with the facility for challenge in arbitration. In *NCB v Neil* [87] it was concluded that there was no rule of law or construction applicable to

[81] "There is, after all, nothing to prevent a party from requiring that work shall be done to his own satisfaction", Minster Trust Ltd. v Trapps Tractors Ltd. (1954) 1 W.L.R. 963 per Devlin J. at 973. The same point would arise if the requisite satisfaction is of an agent of the employer it may "be plain that he is to function only as the *alter ego* of his master" and not independently as ordinarily applicable to a certifier.

[82] In National Coal Board v Neill (1985) 1 Q.B. 300, the position was reviewed, but by reference to the satisfaction of a third party.

[83] Bateman (Lord) v Thompson (1875) Hudson's Building Cases, 4th edtion, Vol. 2, 36.

[84] Considered under Réception and Payment.

[85] Such approval may well be required to be expressed by certification.

[86] Kenney v Barrow-in-Furness Corporation (1909) Hudson's Building Cases, 4th ed. Vol.2, 411 at 413 (C.A.). ICE 91, clause 66 (4) uses "final and binding".

[87] National Coal Board v Neill (1985) Q.B. 300.

building contracts that a contractor is to be taken to have fulfilled his obligations upon the expression of satisfaction of the independent professional where the contract provides for the work to be executed in a stipulated manner, as well as to that person's satisfaction.[88]

Conversely, in *Atu Ul Haq v City Council of Nairobi*[89] the conclusion was that where the contractor was obliged to execute works "under the direction of and to the entire satisfaction in all respects of the Engineer" a certificate issued at the beginning of the maintenance period which started "when the Works have been executed according to the provisions of the Contract and to the satisfaction of the Engineer" terminated the contractor's obligations, subject to the maintenance provisions, and prevented a claim for damages for defects.[90] This decision was criticised,[91] and the criticism judicially approved,[92] but there seems no good ground for suggesting that finality should not be introduced at the beginning of the maintenance period if that is what the parties have provided, and indeed that is the result which the doctrine of *réception* would have produced, with the vital distinction that the finality of the contract obligation starts the guarantee obligation, and does not leave the employer without remedy.

Finality and discharge

With their English origin but intent for use in countries governed by civil law the FIDIC[93] conditions point the way to the central aspects for comparison between the English and French approach. By clause 43.1 the whole of the works required to be completed within a particular time "shall be completed,

[88] In National Coal Board v Neill, the British Electrical and Allied Manufacturers' Association conditions (1956) were applicable. The relevant provision was that all work to be done under the contract should be executed in the manner set out in the specifications, and, to the reasonable satisfaction of the engineer; the engineer had certified his satisfaction in an unqualified manner, but the obligation to satisfy the engineer was held to be cumulative with the other obligations. JCT 80 is considered later.

[89] Atu Ul Haq v City Council of Nairobi (1962) 28 B.L.R. 76 (P.C.).

[90] The conclusion as to whether a certificate is binding and conclusive "must depend upon the construction of [the] particular contractual documents and though a consideration of the opinions of courts on other words in other contracts in other cases is of assistance the adjudication ... involves thereafter a return to a study of the contract under review.

[91] In the 9th edition of Hudson's Building and Civil Engineering Contracts (1965).

[92] Billyack v Leyland Construction Co. Ltd. (1968) 1 W.L.R. 471, inability to rely on lack of satisfaction of a local authority when resisting a claim for payment.

[93] 4th Edition, 1987. The scheme follows that of the ICE conditions.

in accordance with Clause 48, within the time stated ...".[94] Clause 48.1 provides that when the works have been completed and passed any prescribed tests the contractor may give notice,[95] with an undertaking to finish with due expedition any outstanding work during the defects liability period. The engineer then must within twenty-one days issue a certificate stating the date on which in his opinion the works were substantially completed or give instructions specifying all work required to be done before its issue, which has to meet his satisfaction.[96] The opinion of the engineer may therefore permit of completion with the existence of patent defects.

The defects liability period is calculated from the date of substantial completion as certified,[97] and the obligations of the contractor during it as to completion of outstanding work and remedying defects are "to the intent that the Works shall, at or as soon as practicable after the expiration of the Defects Liability Period, be delivered to the Employer in the condition required by the Contract, fair wear and tear excepted, to the satisfaction of the Engineer ...".[98]

The nature of the contractor's obligation as to carrying out any particular work to achieve completion or in the defects liability period is unexceptional to the French view,[99] for the obligations under Article 1792-6 would

[94] The time is calculated from the commencement date and sublect to extension. Provision is also made for completion of any Section.

[95] The notice is deemed to be a request for a "Taking-Over Certificate".

[96] By clause 48.1 the engineer must also notify the contractor of any defects in the works affecting substantial completion that may appear after such instructions and before completion. The contractor is entitled to receive the Taking-Over Cerificate within 21 days of completion, to the satisfaction of the engineer, of the works specified and remedying of the defects notified. A similar scheme to ICE 91 is applied by Clauses 48.2 and 48.3 in respect of parts of the works.

[97] Clause 49.1, Defects Liability Period: In these Conditions the expression "Defects Liability Period" shall mean the defects liability period named in the Appendix to Tender, calculated from: (a) the date of substantial completion of the Works certified by the Engineer in accordance with Clause 48, or (b) in the event of more than one certificate having been issued by the Engineer under Clause 48, the respective dates so certified; and in relation to the Defects Liability Period the expression "the Works" shall be construed accordingly.

[98] Clause 49.2 Completion of Outstanding Work and Remedying Defects: "To the intent that the Works shall, at or as soon as practicable after the expiration of the Defects Liability Period, be delivered to the Employer in the condition required by the Contract, fair wear and tear excepted, to the satisfaction of the Engineer, the Contractor shall: (a) complete the work, if any, outstanding on the date stated in the Taking Over Certificate as soon as practicable after such date and (b) execute all such work of amendment, reconstruction, and remedying defects, shrinkages or other faults as the Engineer may, during the Defects Liability Period or within 14 days after its expiration, as a result of an inspection made by or on behalf of the Engineer prior to its expiration, instruct the Contractor to execute."

[99] M. Frilet, How certain provisions of the FIDIC contract operate under French law. (1992) 9 I.C.L.R., 121.

comprehend those within clause 49.3. Equally in England a failure to comply with defects liability obligations would give the employer an action for such particular breach, without the necessity for provision for recovery internal to the contract.[100] This disposes of difficulties with completion in relation to defects that are patent or become apparent within a short time. It is in relation to the discharge from liability under the contract that contrast is highlighted. First, as the nature and effect of the discharge, and second as to the manner of its achievement.

In England there is nothing to prevent an employer looking to the basic obligation of the contractor to carry out and complete the works in accordance with its terms in order to found a cause of action on the contract itself within the permitted limitation periods. In France the development and use of *réception* in the Code Civil imposes on the parties so that the employer, whilst losing the ability to rely on the pre-existing contract to found his rights, has substituted for him the scheme of the biennial and decennial guarantees, being provisions *d'ordre public.* By reason of *réception* , which is the start in time of the guarantee obligations of the contractor, the employer in France does not have recourse to an action for breach of the contract provisions.[101]

Whilst in England finality and so discharge of a contractor's obligations under a building contract may result from the terms used and the circumstances, the role of the professional intervenes with the function of independently certifying, deciding and opining, so setting himself apart from acting in that respect as agent of the employer.[102] Under JCT 80 the fact of the issue by the architect of the certificate of practical completion is not conclusive against the employer that apparent defects do not exist, and the contractor cannot rely on the architect's inspection or lack of it in revealing

[100] Clause 49.4, Contractor's Failure to Carry Out Instructions: "In case of default on the part of the Contractor in carrying out such instruction within a reasonable time, the Employer shall be entitled to employ and pay other persons to carry out the same and if such work is work which, in the opinion of the Engineer, the Contractor was liable to do at his own cost under the Contract, then all costs consequent thereon or incidental thereto shall, after due consultation with the Employer and the Contractor, be determined by the Engineer and shall be recoverable from the Contractor by the Employer, and may be deducted by the Employer from any monies due or to become due to the Contractor and the Engineer shall notify the Contractor accordingly, with a copy to the Employer."

[101] Cass. Civ. 3, 13th April 1988. This does not apply in the case of fraud or a default of the contractor that might give rise to a liability in tort; or in a case of gross misconduct, Cass. Civ. 3, 23rd July 1986.

[102] Keating on Building Contracts, 5th edition, discussed at Ch. 5.

defects as an excuse for not complying with the contract.[103] It does however lead towards the final certificate,[104] which has an effect in any proceedings arising out of or in connection with the contract, whether by arbitration or otherwise, as:

> "conclusive evidence that where and to the extent that the quality of materials or the standard of workmanship are to be to the reasonable satisfaction of the Architect .. the same are to such satisfaction ...".[105]

As conclusive evidence the final certificate is not open to contradiction,[106] and it is as binding as to fact as if it was an arbitrator's award,[107] but is not an award or subject to the Arbitration Acts.[108] It is only conclusive however on those matters with which it deals, and even in the above respect the extent to which the quality of materials and the workmanship are to be to the reasonable satisfaction of the architect may or may not represent a significant element of the contractor's obligations, for specification requirements under the contract may apply without reference to the architect's satisfaction.[109] Such discharge, to the extent that a true construction of the specification may reveal, is binding unless the conclusive effect is negated by resort to the exception of either the employer or the contractor commencing arbitration or other proceedings before or within twenty-eight days of the issue of the final certificate.[110]

Under FIDIC the obligation on the contractor is not just to execute and

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[103] East Ham Borough Council v Bernard Sunley & Sons Ltd. (1966) A.C. 406 (H.L.).

[104] JCT 80, Clause 30.8: "The Architect ... shall isue the Final Certificate ... not later than 2 months after whichever of the following occurs last: the end of the Defects Liability Period; the date of issue of the Certificate of Completion of Making Good Defects under clause 17.4 the date on which the Architect ... sent a copy to the Contractor of any ascertainment ...".

[105] Clause 30.9.1. By clause 30.10, save for the Final Certificate as provided, "no certificate of the Architect shall of itself be conclusive evidence that any works, materials or goods to which it relates are in accordance with this Contract." There are other effects, including entitlement to final payment.

[106] Kaye (P&M) Ltd. v Hosier & Dickinson Ltd. (1972) 1 W.L.R. 146 at 169 (H.L.).

[107] Goodyear v Weymouth Corporation (1865) 35 L.J.C.P. 12 at 17.

[108] Sutcliffe v Thrackrah (1974) A.C. 727 (H.L.).

[109] JCT 80, Clause 2.1: "The Contractor shall ... carry out and complete the Works shown upon the Contract Drawings and described ... in the Contract Bills .. using materialsand workmanship of the quality and standards therein specifie, provided that where and to the extent that approval of the quality of materials or of the standards of workmanship is a matter for the opinion of the Architect ... such quality and standards shall be to the reasonable satisfaction of the Architect."

[110] JCT 80, Clause 30.9.2 and .3.

complete the works but to do so "to the satisfaction of the Engineer".[111] What then of the act of *réception* as the act of the employer? To constitute the engineer as agent of the *maître d'ouvrages* may be unobjectionable but this does not accord with the independent role between the parties required under English law, nor that in which the parties by these conditions will have cast him, for by imposing obligations to meet the engineer's satisfaction they give him discretion which has to be exercised impartially.[112] The engineer's opinion as to completion, or as to any other opinion, instruction, determination certificate or valuation, may be disputed and is susceptible to arbitration and its opening up and review. First though the requirement is for the dispute to be referred to the engineer himself for a decision to which effect has to be given and which becomes final and binding unless due notice of arbitration is served, and until it is revised in an amicable settlement or award.[113] The result is undoubtedly a conclusion of disputes, but comparison with the longstanding concept of *réception* illustrates that the English approach, of reliance on the professional as both agent and quasi-arbitrator,[114] is at odds with that in France. This becomes apparent also in relation to final payment to which *réception* gives rise.

[111] Clause 13.1, Work to be in Accordance with Contract: "Unless it is legally or physically impossible, the Contractor shall execute and complete the Works and remedy any defects therein in strict accordance with the Contract to the satisfaction of the Engineer...". Commented on by A. Norris, The FIDIC Conditions of Contract for Works of Civil Engineering Construcion- 4th edition 1987- The Works Quality, Defects and End Product. (1989) 6 I.C.L.R. 390.

[112] Clause 2.6, Engineer to Act Impartially: "Wherever under the Contract, the Engineer is required to exercise his discretion by: (a) giving his decision, opinion or consent, or (b) expressing his satisfaction or approval, or (c) determining value, or (d) otherwise taking action which may affect the rights and obligations of the Employer or the Contractor; he shall exercise such discretion impartially within the terms of the Contract, and having regard to all the circumstances. Any such decision, opinion, consent, expression of satisfaction, or approval, determinationof value or action may be opened up, reviewed or revised as provided in Clause 67."

[113] FIDIC, clauses 67.1 to .4.

[114] Apart from the point that at the very time when the employer requires the assistance of his engineer as a partisan he is placed in an impartial position.

1 The Right to and Time for Payment

Entire Contracts

The impact of *réception* in providing the right to payment may be viewed in the light of an entire contract under English law, under which the obligation to make payment does not arise until the whole of the work is entirely performed. They are indivisible obligations and entire fulfilment is a condition precedent, so that the former does not arise until the latter is performed in every respect. Undoubtedly parties are at liberty to contract of those terms, and whilst an entire contract will be given its effect, only the clearest of language is permitted to deprive the contractor of any payment until completion to every minor detail. In *Appleby v Myers*,[1] where the plaintiff contracted to erect machinery at the defendant's premises at specific prices for particular portions and to keep it in repair for two years with the price to be paid upon completion, the principle from *Cutter v Powell* [2] was restated, and with the identification of three routes to recovery:

> " ... the plaintiffs having contracted to do an entire work for a specific sum, can recover nothing unless the work be done, or it can be shown that it was the defendants fault that the work was incomplete, or that there is something to justify the conclusion that the parties have entered into a fresh contract."

Equally, without agreement to the contrary or a custom to that effect the base proposition is recognised in civil law that the workman must complete the

[1] (1867) L.R. 2 C.P. 651.
[2] (1795) 6. Term Rep. 320.

promised work before he can claim any remuneration.[3] In England this rule, which might have been thought to have been waning in effect,[4] was applied to prevent recovery under a contract for installing central heating where a host of defects led to conclusion that substantial performance had not been achieved.[5] Its scope is much reduced by virtue of interim payments, for, where the contract provides "for progress payments to be made as the work proceeds, but for retention to be held until completion. Then entire performance is usually a condition precedent to payment of the retention money but not, of course, to the progress payments. The contractor is entitled to payment pro rata as the work proceeds, less a deduction for retention money. But he is not entitled to the retention money until the work is entirely finished, without defects or omissions."[6]

Substantial Completion and Independence of Terms

"When a contract provides for a specific sum to be paid on completion of specified work, the courts lean against a construction which would deprive the contractor of any payment at all simply because there are some defects or omissions."[7] This process in respect of the ordinary lump sum contract for building work in England again provides lessons both ways in comparison with some of the civil law elements of *réception* .

Subject always to any other terms of the contract that affect the right to or time for payment, once there has been substantial completion then the contract price is due, against which the employer may establish the existence of defects as breaches of contract for the purposes of deduction by set-off or counterclaim. The root of this principle is in the ability of the employer to recover damages:

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[3] The German expression for the obligation to perform first is Vorleistungspflicht. The moment of payment in relation to completion gives rise to differences. In Austria the term in its Civil Code, ¶¶ 1170 is "nach vollendetem Werk", after completion of the work. In Switzerland payment is upon delivery of the work ,Code of Obligations article 372 -1. In Germany and Italy acceptance of the work is the appropriate time: "bei der Abnahme des Werkes" German BGB ¶¶ 641-1; "quando l'opera e accettata dal committente" Italian Codice Civile Article 1665 al.5..

[4] Through the application of the principle of substantial performance; Hoenig v Isaacs (1952) 2 All ER 176 (C.A.).

[5] *Bolton v Mahadeva* (1971) 1 W.L.R. 1009 (C.A.). *But note that no claim for a quantum meruit was* made upon which advantage could have been taken of the finding that the deficiencies could be repaired for £174, as against a contract sum of £560 plus extras properly totalling £61.

[6] Hoenig v Isaacs (1952) 2 All E.R. 176 (C.A.) per Denning L.J. at 181.

[7] Hoenig v Isaacs (1952) 2 All E.R. 176 (C.A.) per Denning L.J. at 181.

> "... where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid in damages, there the defendant has his remedy on his covenant, and shall not plead it as a condition precedent."[8]

The independence of the obligations and the facility of the remedy in damages was the expression of a mechanism for construing the contract to avoid the impact of completion as a condition precedent to payment, but another was the examination of the extent to which the obligation to complete had to be achieved before it could be used to defeat an obligation to pay:

> "In the one case, the performance of the warranty not being a condition precedent to the payment of the price, the defendant, who had received the chattel warranted, has thereby the property vested in him indefeasibly, and is incapable of returning it back; he has all that he stipulated for as a condition of paying the price, and therefore it was held that he ought to pay it, and seek his remedy on the plaintiffs contract of warranty.
> In the other case, the law appears to have construed the contract as not importing that the performance of every portion of the work should be a condition precedent to the payment of the stipulated price, otherwise the least deviation would have deprived the plaintiff of the whole price; and therefore the defendant was obliged to pay it, and recover for any breach of contract on the other side."[9]

This "other case" describes the route of substantial performance for the first element identified in *Appleby v Myers*, namely showing that the "work be done"; while the third, that of imputing a new contract in the circumstances, has been reflected in the perception of an agreement by conduct,[10] or an implication of a promise to pay arising from acceptance or waiver, or benefit received. The second element, of showing some default on the part of the employer, would be reflected in some act preventing a contractor prepared to remedy defects from so attempting, which is the appropriate course before resort to litigation to recover the lump sum.[11]

The test of the work being done, though in some respects not in accordance

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[8] Boon v Eyre (1779) 1 Hy. Bl. 273, per Lord Mansfield C.J..

[9] Mondel v Steel (1841) 8 M. & W. 858.

[10] Holland, Hannen & Cubitts (Northern) Ltd. v W. H. T. S. O. (1981) 18 B.L.R. 80 at 125.

[11] Bolton v Mahadeva (1972) 1 W. L. R. 1009 at 1025 (C.A.)

with the contract, is linked with possession, use, or benefit of the work in considering substantial performance. The possession taken by the employer was a significant consideration in *Dakin v Lee* where the plaintiff builders succeeded at first on their claim for the price of the work notwithstanding failure to fulfil specification provisions on the grounds that "... where a building or repairing contract has been substantially completed, although not absolutely, the person who gets the benefit of the work which has been done under the contract must pay for that benefit."[12] The argument, that no promise to pay could be implied from the fact that the defendant occupied the house because the work was carried out on the employer's land and therefore could not be rejected, being described as fallacious in circumstances where the work had been substantially completed though not entirely in the manner provided for in the contract. The result was the same on appeal:

> "The work was finished ... I cannot think of a better word to use ... Take a contract for a lump sum to decorate a house; the contract provides that there shall be three coats of paint, but in one of the rooms only two coats of paint are put on. Can anybody seriously say that under these circumstances the building owner could go and occupy the house and take the benefit of all the decorations which had been done in the other rooms without paying a penny for the all the work ..."[13]

The inference of a fresh contract to pay may arise from acceptance of the work, but mere possession will not be determinative as illustrated by *Sumpter v Hedges*,[14] where the builder, having left unfinished his contract to build houses, was unable to recover on his claim for his part finished work, although the defendant carried on and completed the works.[15] The abandonment was critical to the decision that nothing could be recovered albeit:

> " ... there are cases in which, though the Plaintiff has abandoned the performance of a contract, it is possible for him to raise the inference of a new contract to pay for the work done on a quantum meruit from the Defendant's having taken the benefit of that work, but in order that that may be done, the circumstances must be such as to give an option to the Defendant to take or not to take the benefit of the work done. It is only where the circumstances are such as to give that option

[12] H. Dakin & Co. Ltd. v Lee (1916) 1 K.B. 566, Ridley J. at p. 569.

[13] Lord Cozens-Hardy M.R. at 578 and 579.

[14] Sumpter v Hedges (1898) 1 Q B. 673 (CA).

[15] Progress payments had been made at earlier stages in the works.

that there is any evidence on which to ground the inference of a new contract.

Where, as in the case of work done on land, the circumstances are such as to give the Defendant no option whether he will take the benefit of the work or not, then one must look to other facts than the mere taking the benefit of the work in order to ground the inference of a new contract ... The mere fact that a Defendant is in possession of what he cannot help keeping, or even has done work on it, affords no ground for such an inference. He is not bound to keep unfinished a building which in an incomplete state would be a nuisance on his land."[16]

A different result might be possible from a restitutionary approach, but a perception of benefit received or accepted to permit this cannot easily be reconciled with the fact of ownership of the land by the owner and the inability to reject. The availability of a restitutionary claim requires the voluntary acceptance of a benefit which is not satisfied merely by continued occupation by an employer of his own land.[17]

The requirement for substantial performance cannot be ignored for, without other factors, the line that prevents recovery of the contract sum may prevent a remedy in restitution.[18] This was the result in *Bolton v Mahadeva* [19] where on appeal it was found that a contract for a domestic central heating and hot water system had not been substantially performed because of a category of defects:

"... such that it does not heat the house adequately and is such, further, that fumes are given out, so as to make living rooms uncomfortable, and if putting right of those defects is not something which can be done by some slight amendment of the system, that I think that the contract is not substantially performed."[20]

Benefit there may have been even though the heating was up to thirty per cent below the requirement, but the detriment clearly weighed in favour of the conclusion as "the fumes ... made some of the living rooms (to put it at the lowest) extremely uncomfortable and inconvenient to use".

[16] Collins L.J. at 676.

[17] But, interestingly, the builder in Sumpter v Hedges did have a claim for the reasonable value of loose materials left on site.

[18] Birks, An Introduction to the Law of Restitution, p.239; Goff & Jones, The Law of Restitution, 4th ed., p. 439 and 441.

[19] (1972) 1 W.L.R. 1009.

[20] Cairns, L.J. at 104.

Acceptance, not constituting a discharge from liability but giving rise to a right to payment, may, unusually, be inferred without substantial performance. This occurred where A under a contract built a sewer but not the pumping station that was to serve both A's and B's land; B then built a pumping main as a temporary measure and connected up his own sewers to the one built and thus having accepted the benefit work of A's work was liable for payment of the contract sum less the cost of the pumping station.[21]

Acceptance is also reflected in waiver so as to give rise to the same result as substantial performance:

> "Even if entire performance was a condition precedent, nevertheless the result would be the same, because I think the condition was waived. It is always open to a party to waive a condition which is inserted for his benefit. What amounts to a waiver depends on the circumstances. If this was an entire contract, then, when the Plaintiff tendered the work to the Defendant as being a fulfilment of the contract, the Defendant could have refused to accept it until the defects were made good, in which case he would not have been liable for the balance of the price until they were made good. But he did not refuse to accept the work. On the contrary, he entered into possession of the flat and used the furniture as his own, including the defective items. That was a clear waiver of the condition precedent. Just as in a sale of goods the buyer who accepts the goods can no longer treat a breach of condition as giving a right to reject but only a right to damages, so also in a contract for work and labour an employer who takes the benefit of the work can no longer treat entire performance as a condition precedent, but only as a term giving rise to damages. The case becomes then an ordinary lump sum contract governed by the principles laid down in Mondel v Steel and H. Dakin & Co. Ltd. v Lee. The employer must, therefore, pay the contract price subject to a deduction for defects or omissions."[22]

Instalments and Final payment

Agreement or custom generally give rise to payment by instalments. Whilst the entire contract a contract is an important starting point, and impacts on the release of retentions, detailed conditions in the standard forms of contract

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[21] Tannenbaum Meadows Ltd. v Wright Winston Ltd. (1965) 49 D.L.R. (2d) 386, Ontario Court of Appeal. A's conduct might have amounted to a repudiation but was not accepted.

[22] Hoenig v Isaacs (1952) 2 All E.R. 176 (C.A.), per Lord Denning, M.R. at 181.

make provision for progress payments, and a contract which gives the contractor an enforceable right to instalments cannot be an entire contract to that extent because the contractor has the right to call for fulfilment of the employer's obligation to pay before he has completed his own promise.[23]

The right to payment by instalments does not in all cases require express provision before it may be implied, for "... a man who contracts to do a long costly piece of work does not contract, unless he expressly says so, that he will do all the work, standing out of pocket until he is paid at the end. He is entitled to say ... there is an understanding all along that you are to give me from time to time at reasonable times payments for work done."[24]

Under AFNOR 91 a *maître d'oeuvre* is provided for, who is entrusted by the employer with the task of directing the work, as well as acting in relation to *réception* and payment for the work.[25] The entitlement of the contractor to payments stipulated by the contract is expressed as on the discharge of his obligations,[26] and instalments are to be paid within 30 days of the submission of his progress report, *état de situation* . This report has to show the work done from commencement valued under the terms of the contract,[27] and any additional work orders, distinguishing where applicable work performed by sub-contractors.[28] Failure to produce the report at the due time entitles the employer to ascertain the work performed at the contractor's expense. The *maître d'oeuvre* has to verify it, draw up a provisional account and a certificate for the difference between that account and sums previously certified, apply any deduction for work done at the contractor's expense, and

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[23] Terry v Duntze (1878) Hudsons Building Cases, 4th ed. Vol. 2, 389.

[24] The Tergeste (1903) p.256 at page 34, Phillimore J. Under the Swiss Code of Obligations, Article 372 al. 2, where work is to be delivered in parts and remuneration has been agreed for each of the parts it is payable at the time of delivery. Even where no price was agreed a shipwright who had agreed to carry out a thorough repair on a ship was held entitled to demand payment for part of the work he had carried out, Roberts v Havelock (1832) 3 B & Ad. 404.

[25] AFNOR 91 article 1.4.15.

[26] Article 18.1, " *de l'observation par l'entrepreneur de ses obligations* ".

[27] Article 17.1. The report is to be prepared monthly or otherwise as specified. It has to reach the *maître d'oeuvre* on the date provided for or within ten days of the beginning of the month.

[28] It also has to show materials on site or in the workshops of the contractor for which payment provision has been made, the reimbursement of advance payments, andthe composition of the performance bond retention fund; articles 17.1.2 to 5. The application of price adjustment formula may be dealt with in a separate document, article 17.1.6. There are provisions for valuing work ordered by injunction and urgent work, and reference to any special provisions for valuing off-site materials.

send them to the contractor.[29]

Except for the onus on the contractor to produce the report the mechanism is that followed in JCT 80,[30] and neither interim verification in AFNOR 91 nor certification in JCT 80 are an expression of finality.[31]

The final accounting under AFNOR 91 is linked to *réception* for within 120 days of it the contractor must send the final statement of what he considers due.[32] The *maître d'oeuvre* must draw up the final account within 60 days of receipt and send it to the contractor who has 30 days to comment, in default of which he is deemed to have accepted it, and the employer has 40 days to accept or reject those comments in default of which he is deemed to have accepted them.[33] Payment on the final account is due 30 days after the contractor's notification, whether comments are made or not, but where there is disagreement any sum resulting from the determination of it is due within 20 days.[34] Accordingly the achievement of *réception* is in these terms the equivalent of substantial completion under English law for the final payment due does not include the retention.[35]

Acceptance, Approval and certification

The reference to acceptance in relation to payment of the price requires a view of approval. The principle that an acceptance of the work, in the absence of a provision making it binding on the employer, will not prevent an action for damages is relevant to the recovery of payment. This obsevation appears equally applicable to approvals. The less ready the court to infer that approval shuts out the subsequent ability to rely on the contract obligations to found recovery of damages, the less ready to conclude that approvals constitute conditions precedent to payment. The converse is that

[29] Articles 17.4.1.1 to 6. Upon disagreement by the contractor another certificate is to be issue within ten days if the point is accepted.

[30] JCT 80 clauses 30.1 to .4.

[31] AFNOR 91 article 17.4.1.1: *"... cette vérification n'a qu'un caractère provisoire et ne peut être opposée à une vérification définitive des mémoires."* [this verification is only provisional and cannot be used to counter the definitive verifification of accounts.] This is to be compared with JCT 80 clause 30.10 and the final accounting provisions in clause 30.6.

[32] Article 17.5.1, unless some other period is stipulated.

[33] Articles 17.5.1 to .3 and 17.6.1 to .4.

[34] Articles 18.4.1 to .4.

[35] Article 18.4.1: "... amputé de la retenue de garantie ..."

the more an approval is a condition precedent the more it precludes suit.

However, it is at this point that the impact of the independence of the approver or certifier intervenes. Whilst 19th century dictum, that "in modern times the doctrine of conditions precedent has been considerably relaxed, and there is no disposition in the courts to consider stipulations in that light unless the terms of the contract clearly require it",[36] was applied to decisions of employers themselves and their employees or agents, it has not much governed the development of law in regard to such stipulations in building contracts in the case of certification, although it still holds good that the courts are reluctant to regard the satisfaction of a party to be binding if it can be avoided.[37]

Where the approval is of the employer himself,[38] the onerous nature of the condition is treated with caution, so that disapproval must be honest and reasonable.[39] The result is that a person is more likely to be held bound by his personal approval than that of a third party, particularly a person owing him no duty at all.[40]

In the majority of building contracts in England, and in the FIDIC form, work is required to the satisfaction of an architect or engineer. Two separate points ordinarily arise. First whether the builder must obtain the necessary approval before he can claim payment and second whether the employer is bound once the stipulated approval is given. These are not the exact converse,[41] as seen in JCT 80 where a certificate is required for interim payment but is not binding, even without the overriding arbitration clause.

There are three avenues to obtaining payment where the satisfaction of a

[36] Dallman v King (1874) 4 Bing. N.C. 105, per Vaughan J., at 110.

[37] Hudson's Building and Civil Engineering Contracts, 10th Edition.

[38] Or his agent, where he is the true agent, Minster Trust Ltd. v Trapps Tractors Ltd. (1954) 1 W.L.R. 963; and not acting in the independent manner required of an engineer or architect as referred to in Sutcliffe v Thrackrah (1974) A.C. 727 (H.L.).

[39] For the reason that the contractor is in a difficult position if the employer, contrary to the premise that no man shall be a judge in his own cause, can assert disapproval and therefore failure to complete to deny payment.

[40] Billyack v Leyland Construction Co. Ltd. (1968) 1 W.L.R. 471.

[41] They are not converse as the employer may be able to allege defective work, either because the need to obtain satisfaction or approval is not a condition at all and is subordinate to the obligation to perform in accordance with the contract, or, because if it is a condition it is treated as an added protection.

third party is involved. First obtaining the satisfaction, conformity in other respects with the contract being subordinated to that and not a condition,: second, obtaining the satisfaction and conforming to the contract where both are conditions: and third carrying out the contract work as specified with the satisfaction not being a condition at all or with the employer being unable to rely on the absence of the expression satisfaction to deny payment.[42] Only in the third case can there be recovery without the specified satisfaction.

Whether and to what extent the employer is bound will depend on whether the certification or approval is overriding for the event, or is not a condition at all, or is seen as an added protection, and the event of payment may be treated as independent. This is well illustrated in *Billyack v Leyland Construction*,[43] where a contractor sold a house in the course of construction and agreed to "build and complete in a workmanlike manner and in accordance with the specification", which provided that "excavation, concreting ... will be carried out in accordance with by-laws of the local authority and to their satisfaction". By the agreement the second half of purchase price was payable "on the issue of the certificate of habitation by the local authority which certificate shall be conclusive evidence of the completion of the said dwelling house". The foundations were not properly constructed and they infringed the by-laws, and underpinning was required. When sued, the builder argued first that the certificate was an independent reason why the purchaser was barred from claiming; second, that the provision for satisfaction in the specification overrode the obligation to comply with the by-laws; and third that the express requirement to comply with the by-laws negatived any implied term as to the design or suitability of the foundations. It was held that the certificate of the local authority was designated to regulate payment, and not as to the quality of the work; that the provision for the local authority's satisfaction was an added protection for the purchaser and did not override the express obligation as to workmanship; and that there was nothing in the contract inconsistent with the threefold implied undertakings as to good workmanship, suitable materials and fitness for purpose.

[42] For example in the case of some impediment placed in the way by the employer himself, as in Croudace v London Borough of Lambeth (1986) 33 B.L.R. 20, where the want of appointment of than architect resulted the inability to rely on the absence of certification.

[43] Billyack v Leyland Construction Co. Ltd. (1968) 1 W.L.R. 471.

The requirement for a certificate upon which payment is due is an ordinary feature of the standard forms,[44] and although obtaining the certificate is fundamental to the right to payment arbitration is available to resolve disputes as to certification. Certification for interim payment is frequently dissociated from an expression of satisfaction,[45] notwithstanding that it may be for "the total value of the work properly executed" in the opinion of the architect. The mechanism for arrival at the appropriate values does not represent any gulf between the process in England or France, and in principle it should only be expressions of opinion by the architect or engineer if and where they impose finality that should cause concern, but even here the ability to challenge is open through arbitration.

2 Price Reduction

The independence and preservation of the right of the employer under English law to bring an action in damages for breach of contractual obligation, from the right of the contractor to recover payment is an important aspect. It releases what would otherwise be a constraint of the achievement of total completion, and leaves the contract obligations extant for recourse to them whether in respect of patent defects that do not affect the ability to recover payment of the price, or in the event of latent defects. The importance for comparative purposes is also that such ability survives both completion and payment of the price in full or even under a judgment for the price, save where under the particular contract terms approval or certification negates it. The achievement of *réception* in contrast by virtue of its doctrine in civil law removes the right to sue for damages for breach of the contract obligations, bringing to an end both the contractor's obligations as to performance as well as liability in damages for breach of them. After *réception* it is the *garantie* that is fundamental to recovery, but the principles of price reduction and refusal to perform give scope for relief for

[44] As in JCT 80, clause 30.1.1.1: "The Architect ... shall ... issue Interim Certificates stating the amount due to the Contractor from the Employer and the Contractor shall be entitle to payment therefor within 14 days from the date of issue of each Interim Cerificate."

[45] As provided in JCT 80, clause 30.2.1.1, whereas clause 30.10 provides that " ... no certificate of the Architect ... shall of itself be conclusive evidence that any works, materials or goods to which it relates are in accordance with this Contract", save as to the final certificate.

deficient performance.

In England where the buyer has not paid the price he may refuse to accept the goods or pay for them. Under the Sale of Goods Act 1979 he can reject defective goods if the defect is a breach of a condition provided he has not accepted them. On rejection he is entitled to the return of the price if paid. Hence the difficulty of application of this principle to building contracts.

Whilst an effect of *réception* in civil law is to entitle the contractor to payment, there is a liability for defects governed by special rules in that whilst the presence of latent defects in the subject matter of a sale does not constitute default giving rise to damages a choice of remedies is made available: either price reduction or *rédhibition* . The prima facie ability at common law to recover as damages the difference in value of defective work and its value as it should have been under the contract, or the cost of putting them in that condition is contrasted with the liability in civil law derived from the Roman *actiones redhibitoria* and *quanti minoris* . This second is the price reduction where comparison is sought with English principles governing the right to deduct damages from the price,[46] in that the right to damages, being preserved, is available, subject to express exclusion, to be set off against the price.[47]

In French law the obligation to pay the price may disappear upon a claim for the remedy of the *action rédhibitoire* which involves returning the subject matter or its equivalent, hence the practical difficulty of its use in building contracts. The purchaser though has at his disposal the two actions, *rédhibitoire*, and *action estimatoire* for price reduction, and he may even after he has brought one of them institute the other provided there has not been a ruling on his claim by a decision made in a judgment, and provided the vendor has not accepted it.[48] The choice is jealously guarded and the purchaser has the freedom to choose his option without having his

[46] G H Treitel, Remedies for Breach of Contract, A Comparative Account. Though the amount available for deduction on this basis is damages, which may not be calculated on the same basis as that for price reduction.

[47] Gilbert-Ash (Northern) Ltd. v Modern Engineering (Bristol) Ltd. (1974) A.C. 689 (H.L.). For sale of goods section 53 (1) (a) of the Sale of Goods Act 1979 applies.

[48] Civ. 2, 11th July 1974, Bull. civ. II, 231.

intervening attempts to remedy the defect taken into account.[49]

Price reduction was the subject of the Roman *actio quanti minoris*, and for example, where Articles 1641 and 1643 apply in the case of sale,[50] Article 1644 enables the purchaser to achieve this result through the medium of the adjudication of experts.[51] It differs from damages and is based on restitutionary principles, and although the process of the reduction in French law has been described as one of setting off damages against the price,[52] this does not reflect its true nature.

A claim under civil law may be one to have the price reduced in the proportion which the actual value bears to the value which it would have had if not defective. It is not a claim for loss of the bargain although the entitlement to such damages exists if there was an express warranty or fraudulent concealment. Nor is it right to view the facility in English law for setting off damages as the only mechanism for comparison,[53] when considering the building contract. Certainly a set-off is a defence,[54] and the cross-claim for damages for breach may be used "as a shield, not as a sword",[55] but there is a special rule affecting building contracts that reflects and alleviates the difficulties of rejection:

> "The principle is that when the buyer of the goods or the person for whom the work has been done is sued by the seller or contractor for the price

[49] Civ. 3, 17th February 1988, Bull. civ. III, 38.

[50] The seller's guarantee liability against hidden defects which render the subject unsuitable for the use for which it is intended, and the liability despite the seller not knowing of them himself unless he had stipulated that he would not be under any such liability (with the ability to exclude or limit liability substantially restricted by presumption of knowledge of the *vendeur professionel*).

[51] Article 1644: *"Dans le cas des articles 1641 et 1643, l'acheteur a le choix de rendre la chose et de se faire restituer le prix, ou de garder la chose et de de se faire rendre une partie du prix, telle qu'elle sera arbitrée par experts."* [Within the circumstances of Articles 1641 and 1643, the purchaser has the choice of restoring the thing and recovering the price, or of keeping it and receiving back part of the price, such part to be adjudicated by experts.] It has been held however that where there is a difficulty of operation resulting from a latent defect which only detracts temporarily from the purchaser's use of a property sold, there is no justification for the vendor to suffer a price reduction, Civ. 3, 25th January 1989, D. 1990, 100, note Dagorne-Labbé.

[52] Mazeaud, Leçons III, 2 no. 947.

[53] As does Treitel, International Encyclopedia of Comparative Law, Volume VII, Ch. 16, Remedies for Breach of Contract, 16 - 68, "Common law systems do not recognise the principle of price-reduction for defects in goods (as opposed to damages which can be set off against the price)."

[54] Hanak v Green (1958) 2 Q.B. 9 (C.A.). This may include a set-off of mutual debts and equitable set-off where the matter relied on by a defendant would formarly have given rise to injunctive relief against the plaintiff's claim, namely to prevent him from relying on one covenant without taking account of the defendant's rights under another, an equity that "impeached the title to the legal demand", Rawson v Samuel (1841) Cr. & Ph. 161, Lord Cottenham L.C. at 179.

[55] Stooke v Taylor (1880) 5 Q.B.D. 569, Cockburn C.J. at 575.

> "it is competent for the defendant ... not to set off, by a proceeding in the nature of a cross action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by shewing how much less the subject matter of the action was worth, by reason of the breach of contract;"[56] ."[57]

While it is said that common law systems do not recognise the principle of price reduction for defects as opposed to damages that can be set off against the price,[58] this is not so in respect of the building contract. It is a true abatement which the common law gives as an alternative to the setting of of a cross claim for damages:

> "This is a remedy which the common law provides for breaches of warranty in contracts for sale of goods and for work and labour. It is restricted to contracts of these types. It is available as of right to a party to such a contract. It does not lie within the discretion of the court to withhold it. It is independent of the doctrine of" equitable set-off" developed by the Court of Chancery to afford similar relief in appropriate cases to parties to other types of contracts ... That it was no mere procedural rule designed to avoid circuity of action but a substantive defence at common law was the very point decide in Mondel v Steel ...".[59]

The liability for price reduction in France is independent of fault and is not assessed by reference to the expectation interest of the purchaser on which damages would be assessed. Nor is it as a principle necessarily a matter of assessing the cost of remedial work. Although the principle of assessment under this Article is one of preventing enrichment of the vendor rather than compensating the purchaser for not having received what he bargained for,

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[58] Mondel v Steel (1841) 8 M. & W. 858. The passage cited is at 871-872.

[57] Modern Engineering (Bristol) Ltd. v Gilbert Ash (Northern) Ltd. (1974) A.C. 689, Lord Diplock at 717:" ... a building contract is an entire contract for the sale of goods and work and labour for a lump sum price payable by instalments as the goods are elivered and the work is done. Since the turn of the nineteenth century at least ... there has been a principle of law which is applicable to contracts of this type ... That principle is stated authoritively in the judgment of Parke B. in Mondel v Steel (1841) ... who described it as "established by that date. In so far as it applies to contracts for the sale of goods it has been incorporated in section 53 of the Sale of Goods Act 1893; in so far as it applies to contracts for work and labour it rests upon the common law. The principle is that when the buyer of the goods or the person for whom the work has beeen done is sued by the seller or contractor for the price."; adding "Or, in the words of section 53 (1) (a) of the Sale of Goods Act 1893, the buyer may "set upagainst the seller the breach of warranty in diminution or extinction of the price."", now Sale of Goods Act 1979.

[58] G.H. Treitel, Remedies for Breach of Contract. Treitel points to specific performance of contracts for the sale of land with compensation, being an abatement of price, as the nearest analogous principle, but the principle deriving from Mondel v Steel would seem not to have been considered.

[59] Modern Engineering (Bristol) Ltd. v Gilbert Ash (Northern) Ltd. (1974) A.C. 689, Lord Diplock at 717.

the sale of newly constructed premises is likely to involve resort to Article 1645[60] and the presumed knowledge of the *vendeur professionel* . The vendor of a building to be constructed is not liable for the *action estimitoire* in respect of patent or latent defects under Articles 1642-1 or 1646-1 where he has agreed to the repair of such defects, and the achievement of *réception* will negate the ability to bring any such claim in respect of the contract for work and labour. In England:

> "It is ... open to the parties to a contract to exclude by express agreement a remedy for its breach which would otherwise arise by operation of law ... But in construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption."[61]

3 Refusal to Perform

In France it is not only the mechanism of price reduction that impacts on payment. The defence of refusal to perform, *exception d'inexécution* , provides an effect of which extends beyond the field of termination and into that of payment. The distinction in England between entire and independent obligations does not have a doctrinal counterpart but its equivalent effect is achieved by the categorisation of obligations that are or are not required to be performed in advance of another. Where required as in the performance of a *contrat de louage d'ouvrage* then failure will give rise to the ability to rely on the *exceptio non adimpleti contractus* ,[62] and partial or defective performance would be such a failure.

An example of this civil law application from German law is of a builder who fails to complete the work because he runs out of money, being the same circumstance as in *Sumpter v Hedges* . The same result applies and he cannot recover the price, for the builder is bound to perform in advance of payment, which becomes due on acceptance,[63] but the remedy is temporary in

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[60] Article 1645: *"Si le vendeur connaissait les vices de la chose, il est tenu, outre la restitution du prix qu'il en a reçu, de tous les dommages et intérêts envers l'acheteur."* [If the vendor knew of defects in the subject matter, he is liable ot the purchaser for all damages, in addition to the restitution of the price.]

[61] Modern Engineering (Bristol) Ltd. v Gilbert Ash (Northern) Ltd. (1974) A.C. 689, Lord Diplock at 717.

[62] Mazeaud, Leçons III 2 no. 1355.

[63] German BGB §§ 641.

that the refusal to pay will be upheld until cure of the defect, a waiting position.[64]

The stipulation for instalments reduces the impact of the rule but the principle is seen in the terms of AFNOR 91, that it is upon the discharge of his obligations that the contractor becomes entitled to demand the payments provided for in the contract terms and at the specified intervals.[65] The point is illustrated in respect of non-payment, for in France failure by an employer to perform a requirement for payment of an instalment would under the principle make available to the contractor the defence of refusal to perform further, subject to the restraints that it may be invoked only in good faith and where the failure is regarded as sufficiently serious.[66]

In England the approach of the independence of the obligation on the employer to pay from the obligation of the contractor to complete leads to the analysis of the obligations by reference to repudiation, so that although contract terms may give express rights on non-payment there is no general right of the contractor to suspend work if the employer is in breach of his payment obligation.[67] Unless there is a breach of condition or a fundamental breach by a party, the other is not discharged from his obligation to perform, and an employer's failure to pay an instalment will not ordinarily be sufficient to amount to a repudiation.[68]

Seen through the standard forms, AFNOR 91 modifies the civil law principle in the terms dealing with extension of time resulting from delay attributable to the employer, with a prohibition on the contractor from suspending the work for non-payment without a formal notice at least fifteen days in advance, but rendering the employer liable for the consequences of any interruption resulting from his failure to discharge his obligations and the

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[64] Mazeaud, Leçcons II, 1 no. 1132.

[65] Article 18.1: " *Droits aux Paiements. De l'observation par l'entrepreneur e ses obligations résulte pour lui le droit d'exiger les paiements stipulés à son marché et ce dans les conditions et aux époques fixées par celui-ci.*" [The observation by the contractor of his obligations has the result of entitling him to demand the payments stipulated in the contract at the intervals provided for them.]

[66] The *exceptio* was sought to be introduced by the contractors in the Court of Appeal in the Eurotunnel case, as considered under Specific Performance.

[67] Lubenham Fidelities & Investments Co. Ltd. v South Pembrokeshire District Council (1986) 33 B.L.R. 39 (C.A.), at 70.

[68] Mersey Steel & Iron Co. Ltd. v Naylor Benzon & Co. (1884) 9 App. Cas. 434 (H.L.).

effects such failure might have on the performance of work.[69] There is also express provision for interest on overdue payments.[70] JCT 80, whilst leaving open the route of acceptance of repudiation,[71] deals with the matter of non payment of certificates as a ground for determination by the contractor of his employment after notice.[72] FIDIC addresses such default of the employer in both ways by entitling the contractor to terminate, or to suspend work or reduce the rate of work with the financial consequences borne by the employer.[73]

The EC Discussion Paper identifies acceptance as "of fundamental importance with regard to the construction process", but to English eyes the questions raised as to its form, timing and as to reservations are swept into the one question of whether on the face of it the contractor has done the job. In this respect the flexibility of the common law, the lack of the guarantee obligation, and the continuance of the ability to pursue the remedy of damages after completion and despite payment reduce the "fundamental importance" to a question of fact. Conversely, a requirement for the introduction of the guarantee obligation as a harmonising measure would not only require answers to such questions, but, critically, involve analysis of its relationship with the action for damages. If in replacement of such action, then the involvement of the employer in the act of acceptance would require him to have the advice of architects and engineers for his own protection, and not opinions manifested in any quasi-arbitral manner.[74]

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[69] AFNOR 91, article 7.5.2; Prolongation resulting from Employer's Delays. 7.5.2.1 Delay in Payment The contractor may not in any circumstances suspend work on account of default in payment without having given at least 15 days' notice in advance, by registered letter to the employer and the *maître d'œuvre* . The employer shall be liable for the consequences of all interruption resulting from any failure to abide by his obligations, and in particular any repercussions which it might have on the execution of work of others.

[70] AFNOR 91, artcle 18.7.

[71] JCT 80, clause 28.1: "Without prejuice to any other rights and remedies which the contractor may possess... ".

[72] JCT 80, clause 28.1.1.

[73] FIDIC, clauses 69.1 and 69.4.

[74] "... the system could not have been allowed to exist, had it not been that it has been found that persons in the position of engineers or architects are able to maintain, and do maintain, a fair and judicial view with regard to the rights of the parties" per Lord Alverstone, Hickman v Roberts (1913) A.C. 229 at 234. J. Barber, Rules of Conduct for the Engineer. (1988) 5 I.C.L.R. 290, including a section, The Legacy of Telford and Smeaton.

1 Third Party Benefits

Part of the GAIPEC report related to the transfer of rights to successive owners, with the proposal of automatic transfer, and the Discussion Paper raises questions as to the extent to which the transfer of liability proceedings to successive third parties should be restricted, all of which require thought for their potential implementation and impact. How far off though does English law stand at present in respect of benefits of non-contracting parties and is its proposed direction likely to be viable?[1]

Whilst the normal intention of contracting parties is that the rights and obligations to which the contract gives rise should be theirs alone, discharge of the liability may be required by rendering performance to a third party. This though is performance of an obligation not owed to the third party and is distinct from an attempt to contract in such a way that the third party who is not a party to the contract is entitled to receive the performance and to require it in his own name and in default of its performance.

The concept of contracts for the benefit of third parties has for a long time attracted debate because of the practical need to give effect to such benefits, notwithstanding difficulties perceived in recognising the concept as a legal institution. The fact of sub-contracting, raised in the EC Discussion Paper as a problem area to be addressed, highlights the conflict between the structure of contractual relationships against a desire to permit benefits to extend beyond the parties to them.

It may well be that contract, as seen through an English common lawyer's

[1] Law Commission, Consultation Paper No. 121, completed on 23rd Oct. 1991, Privity of Contract: Contracts for the Benefit of Third Parties.

eyes, is not the appropriate or sole medium through which to attempt to meet the need, or by which to provide mechanisms for enforcement.[2] Judicial applications which have utilised contract to achieve such an end have applied a desire to achieve an individually merited result. In that light, they do not give good ground for the criticism of contract, or of the sphere in which contract properly operates. Rather they point the way towards either the need for some further and specific exceptions from the confines of contract, or the need to develop existing mechanisms outside those confines. The constraints on contract in this area, as seen in England, may be of such general benefit to the regulation of commercial affairs as not to warrant the criticism of them as unjustified, and as to warrant the provision of specific alternative means for overcoming injustices or advancing redress in particular areas.

It was by specific exception that both Roman law, and civil law jurisdictions in recent times, proceeded. Contrary to the use by English lawyers of the phrase *jus quaesitum tertio* to suggest a Roman law heritage of rights of third parties under contracts to which the common law has obtusely closed its eyes, Roman law considered that there was no independent right in a third party who was a stranger to a contract.[3] That was the rule. Subsequently, it is true, exceptions were admitted, but they were only by way of exception so as to enhance, not diminish, the premise.

Zweigert and Kötz cite one of those exceptions, namely the case of a gift made on terms that the donee was to do something for a third party where the third party was given an *actio utilis* against the donee. However, the exception has less to do with a derogation from the basic rule of contract than with the rules as to gifts.[4] The *actio utilis* was not thought of in terms of

[2] Zweigert & Kötz, An introduction to Comparative Law, 2nd ed. where it is suggested that the obstacle to recognition is "a rather dimensional and unabstract way of looking at the problem", but that is to assume that contract should be taken to be the boundary within which the facility for third parties to receive the benefit of an intention to benefit them should be constrained.

[3] Ulpian, Digest 45, 1, 38, 17.

[4] As with a contract by which one person bound himself to give a thing to another so with the gift of a thing. Neither made the other the owner. A further step was necessary namely the handing over, the *traditio*, implying first that it was the real and absolute owner who transferred it and second that he placed the new proprietor in actual possession of it. Gifts in consideration of death represented an exception (*mortis causa donatio*) where death occurred without any *traditio*. Equally so did a gift by legacy. It is thus unsurprising that where the donor was alive the mechanism by which to perfect the gift should have been the *actio utilis* by way of addition to the rules as to gifts, and not otherwise.

contract. If A deposited property with B or lent it to him on terms that he was to redeliver it to C, then C had an *actio utilis* against B.[5] Whilst this might appear more like contract than trust there was no attempt made to rest it on any principle of contract law;[6] "It has been shown that this had nothing to do with contract, but was a condition for the recovery of property unjustly detained. It looks more like trust than contract, but is in fact no more than a sporadic decision on general grounds of equity."[7] It remained true that in principle a third party could not acquire rights under a contract, although the need for specific exceptions had arisen in Roman times,[8] just as it has done subsequently. These relate to particular areas of difficulty, dealt with individually as they arise, as indeed has been done in France.[9]

Debate on English law ordinarily starts with the observations in Dunlop v Selfridge as to fundamental principles:

> "One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *ius quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*"[10]

Notwithstanding argument as to the source of the restriction,[11] the general rule has been thought to include the doctrines of both privity and of

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[5] Digests, 3.42.8.1, from Diodetian. The text refers to *propter aequitatis rationem*. It was this that was invoked in the exception referred to above where the *actio utilis* was attached to the voluntary gift *juxta donatoris voluntatem* .

[6] Although the Law Commission refer to it in this context.

[7] Buckland and McNair, Roman Law and Common Law - A Comparison in Outline. The other instance cited in Zweigert and Kötz as the Roman law recognition of contracts for the benefit of third parties is in dispositions from "one member of a family to another member or to a trustee with the direction that the transferee, possibly on the death of the transferor, transmits the property to third parties, normally descendants in need of support". Perhaps what was in mind was the *adjudicatio* in the division of family estates where the entirety of rights passed in succession to the *persona* of another. This, under the law of succession was by fictitious sale to a *familiae emptor* who was the heir, or who was, after the death, to distribute the property according to the wishes expressed in the testaments. The testator had to disinherit everyone by name who had a natural claim on his property, and there had to be an heir who was to succeed to the *persona* of the testator so as to continue the testator's legal existence. One of the rules applicable on acceptance of the position of heir so as to enable him to receive the property was to render him bound to give effect to the dispositions of the testator. This was the trust (*fidei-commissa*) binding on the heir.

[8] Another exception under Roman law was where a pledgee had sold the pledge on terms that the debtor was to have the right to repurchase it for the amount of the debt, Digests 13.7.13 proemium.

[9] The Code imported the exception by way of gift to the premise that agreements bind only the parties to them. Life assurance contracts were a particular exception, and the special area of sub-contractors is considered under Features of Subcontracting in France.

[10] Dunlop Pneumatic Tyre C. Ltd. v Selfridge & Co. Ltd. (1915) A.C. 847, Viscount Haldane at 853.

[11] Frequently taken to have been established by Tweddle v Atkinson (1861) 1 B. & S. 393, Treitel, The Law of Contract, 8th Ed. 1991; but a contrary view was expressed by Lord Denning in Drive Yourself Hire Co. (London) Ltd. v Strutt (1954) 1 Q.B. 250.

consideration. The Law Commission included third party rights in its programme for the codification of the law of contract, and felt that reform of privity could not be undertaken usefully without reform of the doctrine of consideration.[12] Recently though,[13] it has been expressed that reform of the third party rule,[14] being concerned with who can enforce contracts, could be undertaken without such a reassessment, and without prejudicing the rule that consideration must move from the promisee.[15]

The essence of the current proposals of the Law Commission is, by legislation, "to allow actions by third parties when to do so gives effect to the intentions of the parties."[16] Criticism of the rule over the years has come from academics,[17] and the Law Commission's former proposals,[18] that when a contract by its express terms purports to confer a benefit directly on a third party he should be able to enforce it in his own name, were cited with approval in *Beswick v Beswick* .[19] The case for reform is made on the grounds that the third party rule is a comparatively modern development of which the judicial basis is obscure,[20] that the present law causes hardships and defeats the intentions of parties who wish to benefit a third party; and that exceptions to the rule have been created on an ad hoc basis without thought

12 The production of a code of contract was suspended; 8th Annual Report 1972-3, Law Comm. No. 58.

13 Law Commission, Consultation Paper No. 121, Privity of Contract: Contracts for the Benefit of Third Parties.

14 A person cannot enforce a right under a contract to which he is not a party.

15 Viscount Haldane's speech in Dunlop v Selfridge continued from the above: "... A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request," so identifying the distinction between the privity rule and that of consideration; supported by P.S. Atiyah, Consideration in Contracts: A Fundamental Restatement, (1971).

16 Consultation Paper No. 121, para. 1.5.

17 Professor A. L. Corbin, Contracts for the Benefit of Third Parties. (1930) 46 L.Q.R. 12; M.P. Furmston, Return to Dunlop v Selfridge? (1960) 23 M.L.R. 373; R. Flannigan, Privity - the End of an Era (Error). (1987) 103 L.Q.R. 564; Bayleveld & Brownswood, Privity, Transivity and Rationality. (1991) 54 M.L.R. 48.

18 (1937) Command Paper No. 5449.

19 Beswick v Beswick (1968) A.C. 58, at 72 per Lord Reid who hoped that all the cases which "stand guard over this unjust rule" might be reviewed.

20 Tweddle v Atkinson (1861) 1 B. & S. 393 in fact did not really establish a rule. It proceeded on an admission of an extant rule. A's argument was: "now settled that an action for breach of contract must be brought by the person from whom the consideration moved." On T's argument that general rule was admitted, but that there was an exception, namely contracts made by parents from purpose of providing for children. Wightman J. - "it is now established that no stranger to the considerations can take advantage of a contract, although made for his benefit." Crompton J. - "The modern cases have in effect, overruled the old decisions, they show that consideration must move from the party entitled to sue upon the contract." "It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing on it for his own advantage, and not a party to it for the purpose of being sued." The basis on which T lost in Tweddle v Atkinson was that the agreement sued on was post nuptial and natural love and affection did not support consideration, so that the agreement sued on was without consideration.

for the overall development of the law.[21]

How though would the proposals impact on the building world, and would they assist harmonisation? The effect would be to create general rights available to third parties very much akin to rights in tort which were created in *Dutton*,[22] and *Anns*,[23] and which have been curtailed.[24] Such a step may be neither commercially desirable nor justified by actual or potential injustice, and would appear to extend beyond the needs identified by GAIPEC or the end of harmonisation.

Exceptions to the rule against privity do not form a coherent body of law, but they may be workable; and those based on the common law and equity are capable of being adapted to suit the needs of justice. Material exceptions to the rule already extant in the building field are not considered in the Consultation Paper. In the construction industry, there are well established commercial practices based on the rule of privity and any change would produce complications leading to more frequent litigation, as well as a likelihood of contracting out. The Commission's acknowledgement and acceptance of the ability to contract out emasculates argument as to a need for overall change; points towards a more targeted approach where necessary; and, contrary to its aim, sets out a convincing case for retaining the present law.[25] The implementation of any change in the rule would lead to a number of structural difficulties which do not yet appear to have been addressed.

The Consultation Paper touches on the subject of construction but does not consider the scope of the contractual arrangements, nor does it reflect the reasons why particular modes of contracting are adopted. These are not peculiar to England. Construction work often involves financial risks which exceed the resources of the participants; most contractors have an annual

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[21] The previous Law Revision Committee's report, and judicial comment that reform should come from the legislature.(1937) Cmnd. 5449; Midland Silicones Ltd. v Scruttons Ltd. (1962) A.C. 446, at 467-8, per Viscount Simonds; but more recently in Woodar Investment Developments Ltd. v Wimpey Construction (UK) Ltd. (1980) 1 W.L.R. 277 Lord Salmon at p. 291 hoped that the House of Lords would reconsider the law concerning damages for loss suffered by third parties, unless altered by statute.

[22] Dutton v Bognor Regis U.D.C. (1972) 1 Q.B. 373 (C.A.).

[23] Anns v London Borough of Merton (1979) A.C. 728 (H.L.),

[24] By Murphy v Brentwood D.C. (1991) 1 A.C. 398 (H.L.).

[25] Particularly paragraph 4.3 of the Consultation Paper.

turnover which greatly exceeds their financial assets, and few if any firms of architects or engineers could individually meet the claims which are regularly brought against them. The factor which makes it possible for the industry to function in the way that it does is a careful structuring of liabilities, now based exclusively on the law of contract. Casting aside the rule of privity would have a serious effect on this structure, the precise nature of which is difficult to predict.

The Consultation Paper correctly observes that the numerous contracts typically involved in construction projects are currently regarded as enforceable by and against only the parties to the contract. The chain of liability was a strong policy ground in the consideration of implied warranties.[26] Undoubtedly there was an attempt to apply the law of tort as an exception to the privity rule, but the process, which took some 20 years to work through the courts has substantially ground to a halt.[27] As the law currently stands, although most of the participants in the construction industry would be held to owe duties of care in tort, such duty would not cover economic loss as now understood, with the result that this type of loss may now be claimed only between parties to a contract.

The recent up-surge in use of the express collateral warranties which seems to be looked on in the Consultation Paper with disfavour, is a direct reaction to the demise of the law of tort, but they are not new. They are a useful, and now inevitable, device for creating and regulating liabilities. They introduce certainty where the law of tort involved doubt, and are to be preferred to the recommended solution of a general alteration to the law of privity, which would not diminish demand for them. Their adaptation would provide the appropriate mechanism to meet the guarantee proposals of GAIPEC, if implemented.

Collateral warranties were developed in the construction industry after *Gloucestershire v Richardson*.[28] In the subsequent development of standard

[26] Young & Marten Ltd. v McManus Childs Ltd. (1969) 1 A.C. 454 (H.L.).

[27] As considered under Fault, Tort and Economic Loss, The English Experience.

[28] Gloucestershire County Council v Richardson (1969) 1 A.C. 480 (H.L.), They had been suggested in argument in the Court of Appeal, (1967) 3 All E.R. 458 (C.A.), by Russell L.J..

forms of warranty, mostly issued by the RIBA/JCT,[29] consideration has been given to the precise obligation to be undertaken, and warranties have worked well in practice. There are many disputes as to breaches and their extent; but there are no reported cases in which the meaning of the obligation under the warranty has been disputed. *Greater Nottingham v Cementation*[30] shows a warranty being held to represent the limit of the obligation undertaken by the warrantor. If the warrantee can nevertheless claim the right to enforce some other contract made by the warrantor, the system becomes uncertain or even breaks down.

There has been a rapid redevelopment of interest in collateral warranties as a means of replacing or substituting the uncertainty of rights in torts, and all sides of the industry seized upon the opportunity to define precisely what duties were to be taken on. This led to the development of a number of new forms with the involvement of professional bodies, major funders and users. In addition, it was realised that there was no point in warranties that were not effectively backed by insurance, and this has now led to the development of a new generation of standard forms of warranty which are the product of lengthy and tough negotiation, and represent obligations seen as fair and acceptable by all sides of the industry.

The existence of large numbers of warranties should not be regarded as reprehensible or as imposing a burden through the weight of numbers, against the advantage of certainty and the confidence of insurance backing. A development in this field is on the effect of assignment of warranties,[31] and draftsmen will have to succeed in fulfilling requirements or overcoming problems which emerge.[32]

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[29] The 1973 form was issued by the R.I.B.A.; it was redrafted with additions to become the JCT form NSC/2 with slight amendments in 1987 and 1988; Keating on Building Contracts, 5th Edition, p.799.

[30] Greater Nottingham Co-operative v Cementation Piling (1989) Q.B. 71 (C.A.).

[31] J. Cartwright, Warranties and Duty of Care Documents: Problems of Assignment. In Legal Obligations in Construction, Uff & Lavers (eds.); I.N.Duncan Wallace, Assignment of Rights to Sue for breach of Construction Contracts. (1993) 109 L.Q.R. 92, and note at (1994) 110 L.Q.R. 42 on Linden gardens Trust Ltd. v Lenesta Sludge Disposals Ltd. (1993) 3 W.L.R. 409.

[32] The NHBC scheme in this regard is a good example. The difficulties arising from the mere prohibition on the builder objecting to third party enforcement were highlighted in the challenge in Marchant v Caswell & Redgrave and N.H.B.R.C. (1976) J.P.L. 752. A prospective appeal from the builder's unsuccessful challenge was not pursued, but the decision was doubted and not followed in Kijowski v New Capital Properties Ltd (1987) 15 Con. L. R. 1.

Although warranties represent the latest and most important development in the structuring of contractual obligations in the construction field,[33] the conventional arrangement of main and sub-contracts, and of consultancy agreements, is also based upon the rule of privity. The contracting parties enter into their obligations in the knowledge that contractual rights are exercisable only by and between the parties to the contract in question. An example of this is the elaborate procedures developed for nominated sub-contracts, with the employer selecting who is to carry out certain elements of the work, but the contract under which the work is performed is between the nominated sub-contractor and the main contractor. This system has been in operation for many years and has resulted in a number of significant decisions of the courts,[34] and the process itself has been accepted as creating no privity. Such direct relationships as the parties have wished for have are created by direct warranties. In regard to nominated sub-contractors, these warranties cover not only liabilities but also matters such as the avoidance of delay on the part of the sub-contractor and an obligation to operate the direct payment provisions in the main contract in favour of the sub-contractor, on the part of the employer, and such a provision shows a precise form of regulation.

Another area of positive reliance on the rule of privity is the management contract; developed by professional institutions over a number of years, and under which much construction work is undertaken in England. The essence of a management contract is that the obligations undertaken by the management contractor are significantly limited compared to the position under a conventional contract; the physical work is performed by selected or nominated sub-contractors, the management contractor's role being to manage the whole operation for a fee. The management contractor's limited financial interest in the project is reflected in significant limitations on the contractor's liability in respect of breaches committed by the sub-contractors.[35]

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[33] The simple expedient of the collateral warranty/contract was successfully used in Shanklin Pier Ltd. v Detel Products Ltd. (1951) 2 K.B. 854 where owners entered into a contract to have their pier painted. The supplier of the paint was held to have warranted that it would last for seven years, and when it did not the owners were held entitled to recover direct on the warranty.

[34] NW Metropolitan Regional Hospital Board v Bickerton (T.A.) & Son Ltd. (1970) 1 W.L.R. 607 (H.L.); Fairclough Building Ltd. v Rhuddlan Borough Council (1985) 30 B.L.R. 26 (C.A.); Percy Bilton Ltd. v GLC (1982) 1 W.L.R. 794. (H.L.).

[35] Chester Grosvenor Hotel Co. Ltd. v Alfred McAlpine Management Ltd. (1992) C.I.L.L. 740; where an early non-standard form was held to have this effect.

The employer will usually secure direct warranties from the sub-contractors to provide rights of action, and the structures of such are based on the privity rule, with the parties negotiating for the degree of liability which they find commercially acceptable. If protection of consumers is the end to be achieved then imposition may replace negotiation.

Much construction work is carried out under complex contractual arrangements. Major town centre developments often involve outside funders, a local authority acting as freeholder of the land and prospective lessor, and specially created development companies, whose ownership will be part of the financial package. The viability of the development will also depend on pre-letting arrangements which will themselves require direct or assigned warranties from contractors, sub-contractors and professionals; and there will be detailed insurance arrangements, with bonds and guarantees to allocate levels of risk for all involved. Such transactions are created on the basis of the rule of privity and the contractual complexity of arrangements is no disadvantage: it is desirable that each party knows what is taken on.[36]

One argument in favour of the overall reform appears that the creation of third party rights in contract should be capable of being achieved by "laymen left to themselves",[37] but what is proposed in requiring a search for implication or an intent to benefit third parties would not create certainty, but invite litigation. The proposed answer, to overcome the argument that the promisor might face actions from the promisee and the third party, that there is only one promise which once enforced is extinguished, is of importance in building contracts, particularly in regard to claims for payment where one out of a number of contracting parties has become insolvent. This question is closely regulated in most construction projects and mechanisms are created with the aim of providing security, as with the retention fund. These avoid competing claims, if properly set up and operated.[38] That the right should become extinguished by whoever manages first to enforce it

[36] Although many of these arrangements are specific to the construction industry, it would not be realistic to seek to exclude construction contracts from any general change in the law of privity. The variety of forms of such contracts is such that a satisfactory definition would be very difficult to achieve, and the complexity of construction contracts is not unique. Shipbuilding and offshore oil installations are comparable areas.

[37] Consultation Paper paragraph 4.4 (i).

[38] The Retention Fund could be regulated by legislation itself if required, as in France.

would be an undesirable departure from such arrangements.

The simple proposition that a third party should be able to sue but not be sued,[39] is likely to be equally difficult to preserve in practice. Where payment is sought, the effect of set-off typically produces problems. Where both contracting parties are promising parties against the third party, in the sense of mutually dependent obligations, it would be unjust to permit the third party to sever the mutual covenants. If, as proposed, the promisor could raise defences that he could raise against the promisee this would permit set-offs, and the effect would be that the third party's benefit would be subject to him underwriting the obligations of the promissee to the promisor. It seems to have been forgotten that the rule of abatement is available in building contracts, even apart from set off.[40]

The recognition that such proposed reform might prejudice the rights of contracting parties to vary or rescind the contract is important in that it is a major factor in building contracts that the subject matter of the obligation may vary, and invariably does, sometimes in significant respects. The employment of the contractor may be terminated under the contract, with the obligation to carry out the work being transformed into an obligation to pay contractually assessed damages, as loss and expense. It is difficult to conceive of a third party right to take the benefit of an obligation which may change so drastically. The duty of the supervisor under standard forms includes a considerable discretion in regard to settlement of monetary disputes, approvals and acceptance of non-conforming or varied work. Such matters will change and often prejudice the rights of the third party. Is the third party to have a right to intervene? Would the third party, in the alternative, have a claim against the supervisor for having prejudiced the third party's rights?[41] The Consultation Paper does not address these difficulties, nor can they be covered by a simple statement of principle.

Two overriding grounds for this blanket reform as advanced are the need for

[39] Not seen as an impediment by the Law Commission.

[40] Mondel v Steel (1841) 8 M. & W. 858. None of the comparative materials referred to in the Consultation Paper even remotely suggest that third parties become involved on questions of the civil law remedies of reduction in price or the *exceptio*.

[41] Where the contractor himself is unlikely to have a claim against the supervisor; Pacific Associates v Baxter (1990) Q.B. 993 (C.A.).

coherence and the desirability of the rule being consumer accessible. Greater coherence may be desirable, but it will not be achieved nor permit useful comparison without garnering and examining the extant exceptions. There are highly material statutory exceptions to the privity rule such that, in some areas, it is virtually non-existent. As to the consumer argument, there is no reason why laymen without assistance in the creation of third party rights, should be the test.[42] In the field of construction contracts, there is general awareness of the effect if not the precise definition of the privity rule, in that bargaining is for agreements which bind and benefit only the parties to them. Consumers are more likely to require specific and focused assistance, not a general right to wallow in the mass of paper that frequently accompanies operations under building contracts.

If the proposals were to proceed, it would be necessary to consider what limitation rule should apply to third party rights. This is a particular point for thought raised by the EC Discussion Paper. At present, the limitation rights of the actual contracting parties depend upon the distinction between simple contracts and contracts under seal. It would seem anomalous if the third party could take advantage of a longer limitation period when not a party to the contract at all. If the third party right were to be regarded as akin to a right in tort, that would involve a potentially different starting point. The statutory tendency for the duration of the right has been to create a special limitation period, as under the Defective Premises Act 1972, the Civil Liability (Contribution) Act 1978, the Latent Damage Act 1986, and the Consumer Protection Act 1987. These will all be relevant because they create distinct, and, potentially, rival claims.

A further aspect to be considered would be the effect, as against the third party, of exclusion and limitation clauses in the principal contact. This has been the subject of decisions by which at common law third parties have been unable to rely on an exclusion clause in the contract, unless it was made as agent for them and certain other conditions are fulfilled.[43] Again it would

[42] The parties in *Beswick v Beswick* and *Woodar Investment Development Ltd. v Wimpey Construction UK Ltd.*, being the main cases cited by the Law Commission as showing the injustice, had all been represented by solicitors in the transactions.

[43] Junior Books v Veitchi Co. (1983) 1 A.C. 520; Southern Water v Lewis (1984) 27 B.L.R. 116, The Aliakamon (1986) A.C. 785.

create uncertainty for the third party to avoid exclusions which bore on the essential risks between the contracting parties, and so the cost. The questions posed on this aspect by the EC Discussion Paper contemplate exclusion of liability as against successive owners, raising *force majeure* , acts of third parties or client fault as examples for consideration.

There seems little merit in blanket reform. Instead, effort should be made to identify any areas where further exception is desirable or to examine anomalies within the particular exceptions to the privity rule. Such a method is more likely to permit securing results that are susceptible to harmonisation. The Law Commission identifies the law of trusts as an exception to the third party rule, but there is no recognition of the scope for development available in this area which would appear as an appropriate vehicle for giving overall effect to third party rights.[44] The citation of cases purporting to show the disfavour of the law of trusts towards enforcing third party rights does not show this at all;[45] rather they reflect the terms by which the parties expressed their intention to benefit third parties.[46] The test proposed of an intention to benefit appears as the very test for the "exception" of the trust.[47]

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[44] The description of the trust "as at best a circumvention and at worst a fictional circumvention of the third party rule", para 3.4, represents a dimensional view that presumes contract to be the only mechanism for giving effect to third party rights.

[45] Gandy v Gandy (1915) A.C. 847 (C.A.) is cited as an acknowledgment that Tweddle v Atkinson established the "true common law doctrine". The case arose out of a separation deed. H and W were trustees; H agreed to pay an annuity to the trustees for maintenance of the children; the plaintiff child reached 16; H refused to continue maintainence. The trustees refused to let their name be used in the action to enforce covenant. It was held that the plaintiff was not in position of *cestui que* trust and could not sue, but liberty to add wife as plaintiff. Cotton LJ. "as a general rule a contract cannot be enforced except by a party to the contract ... That rule is subject to this exception; if the contract although in form it is with A is intended to secure a benefit to B so that B is entitled to say he has a beneficial right as a *cestui que* trust under that contract than B would in a Court of Equity be allowed to insist upon and enforce the contract." However the pointer to the trust as a potential vehicle for development is also contained in the judgment is not referred to, namely "But whatever may have been the common law doctrine, if the true intent and the true effect of this deed was to give the children a beneficial right under it, that is to say, to give them a right to have these covenants performed, and to call upon the trustees to protect their rights and interests under it, then the children would be outside the common law doctrine, and would, in a Court of Equity, be allowed to enforce their rights under the deed."

[46] For example in Re: Sinclair's Life Policy (1938) Ch. 799, where the matter decided was an intention to create a trust. At page 803 the point was made that S had not bound himself to keep up payments on the policy, and could himself have surrendered it and kept the money. There was an "intention" to benefit the infant, but the answer simply was that S had omitted to express his intent by using the mechanics available to him. A different result, under the dual intention test, is unlikely.

[47] As in Gandy v Gandy. Also Re: Sinclair's Life Policy, for with nothing to oblige S to keep up the policy there was no ground on which the infant would have been entitled to sue for damages, or require S to keep up the policy, or to claim if the policy had been surrendered. In those circumstances it was impossible to say there was a trust. The court was searching not just for an intent to benefit the infant, but for circumstances to infer an obligation that was enforceable. The former existed, the latter did not.

Important exceptions exist other than those in the argument in the Consultation Paper. One of the areas in which privity was a problem was domestic housing where purchasers who took a conveyance of nothing but the land on which a house had already been built found themselves with no rights to obtain redress for defective work. This was the position in which *Dutton* was decided,[48] but by 1972 the problem had largely been solved without the recourse to tortious liability. First, it was held in *Hancock v Brazier*,[49] that the contract of purchase of a house to be constructed was subject to implied terms which would give the purchaser effective remedies against the vendor. Second, during the 1960's, the construction industry set up the NHBRC,[50] which created a series of forms of contract, backed by insurance, giving effective rights to new houseowners extending in some cases beyond the normal period of limitation.[51] These rights were expressed to be assignable to successive owners, and were held to be enforceable.[52] Third, there was the Defective Premises Act 1972 creating the duty on persons taking on work to see that it is done properly and rendering rights under the Act enforceable by any person acquiring an interest in the dwelling.[53]

The combination of these measures creates a viable exception to the privity rule providing a code both certain and successful in its operation, and an example of how the rule can be successfully abrogated in particular areas. A further exception is section 38 of the Building Act 1984, including the provision that "Breach of a duty imposed by Building Regulations, so far as it causes damage, is actionable except in so far as the regulations provide otherwise ...".[54] The principal difference is that the Defective Premises Act may apply apart from Building Regulation matters; but significantly, the 1984

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48 Dutton v Bognor Regis UDC (1972) 1. Q.B. 373 (C.A.).

49 Hancock v B. W. Brazier (Anerley) Ltd. (1966) 1 W.L.R. 1317.

50 Now the National Housebuilding Council (NHBC).

51 For example, giving 10 years protection against major structural defects.

52 Marchant v Caswell & Redgrave and N.H.B.R.C. (1976) J.P.L. 752, but doubted and not followed a decade later in Kijowski v New Capital Properties Ltd (1987) 15 Con. L. R. 1.

53 Considered under Liability for Defects. The purchaser's rights cannot be excluded by contract and there is specific provision for the limitation period which applies. The judgment of Lord Bridge in D & F Estates considered the Act and the Law Commission Report, which were cited as part of the reasoning by which the the decision in Dutton was questioned, and the claim in tort dismissed.

54 Section 38 (1) (a). The section has not yet been brought into force except for the purpose of enabling regulations to be made. A general consideration of the section is in Keating, Building Contracts, 5th Edition, 372-375; the view is expressed that actions under the Act may well effectively supercede those under the Defective Premises Act 1972.

Act covers building work generally, not limited to dwellings. There has been debate as to whether the 1972 Act should now be extended to cover commercial property,[55] but there is no suggestion that the 1984 Act would not cover commercial buildings.

Other exceptions include the Consumer Protection Act 1987, following the EC Product Liability Directive, which creates statutory rights similar to those that might be available either in tort, or in contract but for the privity rule. The Act imposes strict liability within special limitation periods. With regard to rights under contract, the Civil Liability (Contribution) Act 1978 permits claims between contract breakers who have contributed to the plaintiff's damage. Under both statutes, a third party may effectively enforce a right under a contract to which he is not a party.

The proposal to allow a remedy to a third party when to do so would give effect to the intentions of the contracting parties,[56] would involve a further, probably preliminary, level of litigation in many cases, even where the terms of the contract as regards the benefit sought to be enforced are themselves clear. Unlike the law of tort, where courts have determined that duties of care exist in broad circumstances, every contract would need to be considered individually, and at the expense of the losing party. A remedy under a warranty involves no such uncertainty.

Additionally to being specifically acknowledged, it follows from the proposed test of intention that there could be contracting out, and any change as proposed would be likely to result in the immediate introduction of non-third-party-right clauses. This might create a demand for indemnities against the possibility of third party rights being claimed. The result may therefore be that the cases in which third party rights would be claimed would be those

[55] The point was considered by the Insurance Feasibility Steering Committee of NEDO in preparing the BUILD Report, NEDO 1988.

[56] Law Commission Paper paragraph 5.11. If the intention of the contracting parties is to benefit a third party, and to make it enforceable by the third party then the expression of that positive intent can be implemented by joining the third party and contracting under seal. Sealing is not the formality it once was. For companies, signature by a director and secretary, or two directors, has the same effect as if executed under seal, section 36A(4) Companies Act 1985, and a document intended to be a deed is presumed to be so delivered on execution, section 36A(5). For individuals, section 1 of the Law Reform (Miscellaneous Provisions) Act 1989 came into force on 31st July 1990, abolishing the formal requirement of a seal. What is necessary is the expression of intent.

in which, by inadvertence, the parties omitted to contract out.[57] The recognition of a right to contract out necessarily means that in some cases third parties may think they have rights only to find that they have been removed by terms of a contract on which they wish to sue.[58]

If third party rights were claimed generally in respect of construction contracts, a number of interesting points arise, of which limitation is one.[59] Tort claims were regularly brought because the contractual time limit had expired.[60] Is the third party, therefore, going to be able to avoid a limitation defence under one contract by suing on another contract under which the claim is not statute barred? Additionally, most construction contracts and sub-contracts contain arbitration clauses, and arbitration is regarded as the exclusive remedy for challenging decisions by the contract supervisor.[61] Under present English arbitration law, intervention by the third party in an arbitration would be difficult or impossible.[62] The transfer of a third party's right, statutorily, into some right in the award is not however proposed.[63]

The recommendation advances a dual intention test; that the third party should be able to enforce a contract in which the parties intend he should benefit, but, "should not be allowed to sue on any contract which is simply made for his benefit or which merely happens to benefit him or on which he has happened to rely."[64] Unless the clearest language is used, there are likely to be great arguments as to whether the necessary dual intention exists. The suggestion is for the apparent widening of the test of construing contracts

[57] This would be a curious circumstance in which to start investigating intention to benefit a third party.

[58] Without any restriction on contracting out an exclusion of third party benefit would soon become a standard term. As between the contracting parties the Unfair Contract Terms Act 1977 may be considered, but if the term is not unfair between them the third party would have no ability to class it as such. A solution to this might require some form of control or registration of contracting out.

[59] It has been a real issue in a good proportion of building defect claims, in which area third party rights would be exercised, if available.

[60] The Consultation Paper cites the "decline in Third Parties' rights" referred to by J. Bates, Collateral Warranties (1990) Estates Gazette 13.10.90 p.57, but this was in fact the author's expression of the law as regards liability in tort. There has never been a decline in rights conferred by the parties' contracts where they have made them. Any "difficulty" is the failure to get the contractual documentation in order at the outset, or a change of intent subsequently.

[61] Northern Regional Health Authority v Derek Crouch Construction Co. Ltd (1984) Q.B. 644 (C.A.).

[62] Mustill & Boyd, Commercial Arbitration, 2nd Edition.

[63] Even where there is not an arbitration clause, and no subsisting dispute between the immediate parties to the contract, there is a point, recognised in the Consultation Paper, para. 5.26, as to whether the promisee should be made a party to the litigation. Nothing is advanced as to who should make him a party. If the promisee is not a party it is difficult to see how the third party can fight the case, but a dispute subsequently might arise between the immediate contracting parties.

[64] Paragraph 5.10.

which identifies intentions objectively, but it is not clear whether this view is to be on the same principles than presently applicable.[65] A wider test akin to the approach of the French courts of gathering intent from beyond the limits existing under English law, may not trouble businessmen, but its expression would have clearly to spell out such a major change in the ascertainment of contractual intent,[66] particularly if business efficacy between the contracting parties is to extend to the third party or if the officious bystander is to do his turn in the third party's absence.[67]

Proposals to enable non-contracting parties to invoke the benefits of the contract inevitably involve questions as to the burdens and of necessity the terms of the contract with exclusions and limitations of liability, which may negate the end. Conversely to prevent or restrict exclusions or limitations inevitably affects the balance of risk between the contracting parties themselves. In both these ways the ability for successive owners to benefit from the building contract by enforced assignment or transfer would be an unhappy way forward.[68] Such mechanism would be likely to add another layer of terms that would attach to existing standard forms.

2 Standard Conditions and EC Competition Law

The feature of standard conditions as national norms may itself require consideration for the achievement of harmonisation, and community law already has a potential impact on the use of such conditions. Whilst one of the policies of the Treaty of Rome in respect of competition is undoubtedly towards prevention of restrictive practices which interfere with the integration of the markets of the Member States into a single market, a second policy is the protection and promotion of competition itself, affecting

[65] Prenn v Simmonds (1971) 1 W.L.R. 1371 (H.L.). The approach in France is to gather the real intention of the parties where the words are not clear and precise, considered under Contract and Precontract.

[66] The suggestion is that "surounding circumstances" are wider than an objectively determined intention. Reference is made to the intent to benefit test inthe U.S.A. which has "failed to achieve consistent results", para. 5.12.

[67] Such point might curtail the scope for viewing reliance by a third party as a surrounding circumstance.

[68] Or even without actual assignment, where parties may be treated as having contracted on the footing that the contracting party would be entitled to enforce contractual rights for the benefit of those who suffered from defective performance; as in Linden Gardens Trust Ltd. v Lenesta Sludge Disposals Ltd. (1993) 3 W.L.R. 408 (H.L.), at 430.

agreed bases for tendering, in addition to price fixing or market sharing agreements. The very use of national standard forms may be seen as an impediment to the fostering of competition.

Article 85(1) of the Treaty of Rome prohibits all agreements between undertakings, decisions by associations of undertakings,[69] and concerted practices which may affect trade between Member States and which have as their object the prevention, restriction or distortion of competition within the common market, and any prohibited agreement is automatically rendered void and unenforceable by Article 85(2).[70] Article 85 identifies particular prohibited agreements and concerted practices to include those which "directly or indirectly fix purchase or selling prices or any other trading conditions", so that agreements as to the use of standard conditions or forms of contract are likely to fall within the prohibition and require application for exemption.[71] If Article 85(1) is satisfied,[72] then the considerations of the EC Commission whether to permit exemption from the

[69] "Decisions by associations of undertaking" would include rules of trade associations and their decisions; and "concerted practices" would in any event take in such behaviour as fell short of "agreements". Practical co-operation could well lead to a conclusion of a concerted practice or even evidence an agreement, and whilst similar or parallel behaviour may not itself constitute a concerted practice it is suspected that it would be regarded as evidencing it; ICI v EC Commission, [No. 48/69] (1969) C.M.L.R. 557.

[70] Any agreement, decision, or concerned practice which would otherwise be prohibited may achieve exemption from the prohibition by Article 85(3) where it contributes, amongst other things, to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit and which does not: "(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question." It is only the EC Commission that may grant this exemption so that where a national Court is asked to sanction or enforce any agreement or consider a challenge to one it will, it appears, have to proceed on the basis of the actual prohibition under Article 85(1), for there is no provisional validity during an application for exemption, albeit that account of any application or doubt as to exemption may be reflected in an adjournment of proceedings pending decision by the Commission, as in Brasserie de Haecht v Wilkin (No. 2) [No. 48/72] (1973) C.M.L.R 287.

[71] Categories of agreements or concerted practices which are treated as anti-competitive within the scope of Article 85, subject to the question of incompatibility with the common market, are identified although not exhaustive or definitive of the type of restriction that might fall within the scope of the prohibition. Without doubt agreements which directly or indirectly fix trading conditions are regarded as anti-competitive; but questions will arise as to the impact on arrangements less than complete agreements, for instance the drafting and use of the variety of conditions of contract by the trade and professional bodies in the construction industry.

[72] The form of agreement would be irrelevant and it is likely that a "gentleman's agreement" would be covered; Re: Cartel in Quinine (1969) C.M.L.R. 41.

prohibition become critical.[73]

Article 86 prohibits "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it ... as incompatible with the common market in so far as it may affect trade between Member States".[74] There is no provision for any exemption from this prohibition and it applies "not only to practices that may cause a direct prejudice to consumers but also to those that cause a prejudice to consumers through interference in the structure of actual competition."[75] Article 86 has been found to apply to some suppliers of construction materials which have dominant positions in specific geographical and product markets,[76] and whilst abuse of a dominant position in a substantial part of the EC may be difficult to substantiate against individual contractors in the highly fragmented construction industry, the position of employers in the utilities industries, will come under scrutiny together with groupings of contractors, sub-contractors or employers in or for the use of conditions of contract.[77]

With the expansion of the Commission's programme for integration the result is likely to lead to greater consideration of the circumstances in which

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[73] In the case of the Agreement of the International European Construction Federation (FIFC) and the Comité Européan des Equipements Techniques du Batiment, which standardised tender procedures for the supply of specialised technical equipment, the Agreement included measures favouring consultation with a limited number of firms, especially sub-contractors, for the supply of the equipment, and established a system for compensation for unsuccessful but valid tenders, where tendering costs were high. Ultimately the EC Commission permitted exemption on the basis that the co-operation provided by the Agreement was likely to help promote, or in any event maintain, market access for small and medium sized enterprises, as indicated in the Commission's 18th Report on Competition Policy, but amendments had been required during consideration of the exemption application to delete aspects which could give rise to restraint on price competition, including automatic indemnification of the unsuccessful tenderers, and disclosure of the sub-contractors consulted and the amounts of their tenders.

[74] Examples only of such abuse are given and include "(a) directly or indirectly imposing ... unfair trading conditions"and "(d) making the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

[75] Europemballage Corpn. and Continental Can Co. v EC Commission [No. 6/72] (1973) C.M.L.R. 199 at 224.

[76] As in, BPB Industries plc. EEC (O.J. No. L10/50) 13th January 1989; and, Italian Flat Glass EEC (O.J. No. L33/44) 4th February 1989. Certainly the jurisdiction of Community Law depends on the requirement that there be an effect on trade between Member States, to distinguish it from the application of national rules. For an effect on trade it must be possible to foresee, on the basis of objective factors, and with a sufficient degree of probability, that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States such as to hinder the attainment of the single market in the Community; Consten and Grundig v EC Commission No. 56 and 58/4] (1966) C.M.L.R. 418.

[77] The requirement will it seems be interpreted broadly so that conduct in and affecting one Member State may be seen as impeding the policy of the common market, and for the purposes of determining whether a dominant position is enjoyed, the relevant market will be considered both *ratione loci* and *ratione materiae*.

standard conditions are drawn and used within this context of EEC competition policy and the influence of the Community on national law in this area will undoubtedly expand. Already though the Community law is enforceable in national courts[78] such that Articles 85 and 86 have direct effect so as to create rights enforceable by the individual where extant national law would not otherwise grant an adequate remedy.[79] It is likely that in England Articles 85 and 86 would give rise to a cause of action for both damages and for an injunction at the suit of a party affected by the abusive conduct of a dominant undertaking, or by the operation of a prohibited agreement.[80] The right of action arises through Community Law being introduced into the UK to give an action for breach of statutory duty and it will be of increasing importance how the issue of an actual or potential effect on inter-state trade would be addressed.[81]

The approach of the English courts to the findings as to the elements within Article 86, particularly a pattern of inter-state trade and effects on it, may be

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[78] In the UK by the European Communities Act 1972, Section 2(1).

[79] Garden Cottage Foods Ltd. v Milk Marketing Board (1984) A.C. 130 (HL) per Lord Diplock at 141. A remedy by way of injunction exists to prevent breaches of Article 86, which, as determined by the European Court of Justice in Belgische Radio en Televisie v S.V. SABAM [No. 127/73] (1974) 2 C.M.L.R. 238, produces direct effects in relations between individuals, and creates direct rights in respect of the individuals concerned which the national Courts must protect. In the Garden Cottage Foods case it was held that "A breach of the duty imposed by Article 86 not to abuse a dominant position in the common market or a substantial part of it is categorised in English law as a breach of statutory duty that is imposed not only for the purpose of promoting the general economic prosperity of the common market but also for the benefit of private individuals to whom loss or damage is caused by a breach of that duty.", Lord Diplock at p. 141.

[80] The Garden Cottage Foods case was an interlocutory appeal; but, it was expressed that in the light of the Belgische Radio case and Rewe-Zentralfinance e.G. v Landwirtschaftskammer fur das Saarland [No. 33/76] (1976) 3 E.L.R. 1989 (which latter was to the same effect as respects the duty of national Courts to protect rights conferred on individual citizens by directly applicable provisions of the Treaty and Sections 2(1) and 3(1) of the European Committees Act 1972), it was difficult to see how it could ultimately be successfully argued that a contravention of Article 86 causing damage to an individual does not give rise to a cause of action in English law in the nature of a cause of action for breach of statutory duty. Subsequently, in respect of Article 30, which provides: "Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between member states.", the Court of Appeal held in Bourgoin S.A. v Ministry of Agriculture, Fisheries and Food (1986) 1 Q.B. 716 (C.A.) that the Treaty of Rome had not created any procedures or remedies and had only provided that the national courts should afford no less favourable remedies than those available for the breach of a similar right in national law, and should not so adapt procedures as to defeat the enforcement of such rights; and that whilst a breach of that Article, as a breach under English statute would afford a right to judicial review, it would not give rise to a claim for damages, since it was to be regarded as of the nature of making an invalid order or one in excess of power. In argument, it was advanced that Articles 85 and 86 were based on pre-existing competition law giving rise to relief by way of damages, so as to distinguish the position under Article 30, and the court considered that Article 86 gave rise to a right to damages on breach as well as injunctive relief.

[81] This is particularly so because of the encouragement given by the Commission to parties to seek remedies available from EC competition law through national courts, coupled with increasing awareness within Member States of the possibilities afforded by the direct effect of Articles 85 and 86; EEC 17th Report on Competition Policy.

anticipated to follow the principle that includes any indirect or potential effect which might possibly impede the realisation of the single market,[82] but when considering standard conditions it is instructive to view an approach of the English Restrictive Practices Court in the context of the potential impact of Articles 85 and 86.

The provisions of the Restrictive Trade Practices Act 1956 were considered in the *Birmingham Association of Building Trades Employers' Agreement* case concerning the agreement between members under which the association recommended the use of JCT standard forms.[83] During the hearing the recommendation for use of the standard forms was withdrawn, and replaced by one merely to press for the use of the forms "where such conditions are appropriate", "that is to say that members shall endeavour to persuade the building owner or his professional adviser to use the standard forms of contract unaltered or failing that altered as little as possible."[84]

The relevant rules were that:

> "All members ... shall (i) conform with the requirements and recommendations made from time to time in regard to any form of contract formally adopted by the federation (ii) and otherwise members shall on all occasions press for the use of such conditions as may be issued under the approval of the federation [where such conditions are appropriate] (iii) Provided that in exceptional circumstances the ... federation ... may authorise the use of any other form of contract, subject to such conditions by way of amendment as may appear necessary, (iv) but on no consideration shall a member sign a form of

[82] La Technique Miniere v MasChinenbau Wm GmbH [No. 56/65] (1966) C.M.L.R. 357. Albeit that in Cutsforth v Mansfield Inns Ltd. (1986) 1 W.L.R. 558, in granting an injunction on the basis of Article 85(1) and other Community regulations restraining exclusion suppliers from the tied houses, the court rejected the point that the conditions of agreement had any effect on trade between member states.

[83] Re: Birmingham Association of Building Trades Employers' Agreement (1963) 1 W.L.R. 484. The National Federation of Building Trades Employers, then had some 13,846 members comprising about two-thirds of all builders in England and Wales, and there were 252 local associations of which the Birmingham Association had about 200 members. The local associations were grouped into 10 regional federations and the rules of the National Federation, the Midland Federation and the Birmingham Association were initially identical. The Act applied to the construction or carrying out of buildings, structures and other works by contractors. It was repealed and replaced by the 1976 Act.

[84] There were 10 standard forms of conditions of contract the subject of the recommendation including the the four major JCT forms of main contract, local authorities and private editions, with and without quantities, two standard forms of sub-contract, the standard form of tender for nominated suppliers and the small works' Conditions of Estimate, all issued under the sanction of the Royal Institute of British Architects, the NFBTE and the Royal Institution of Chartered Surveyors save for the sub-contract forms which were issued respectively under the sanction of and approved by the NFBTE and the Federation of Associations of Specialists and Sub-Contractors , and under the sanction of the NFBTE and approved by the National Federation of Plastering Contractors.

contract which has been objected to or declined by the federation ... on account of its arbitrary and inequitable conditions, unless the ... federation shall otherwise decide."

The constitution of the association had to be read as if containing the agreement of members to comply with the recommendations;[85] but it was contended, and rejected, that the recommendation in its original form amounted to no more than one to press for use of the forms whenever appropriate, so as not to constitute restrictions.[86] Of the four elements of the relevant rules (i) (iii) and (iv) were not even defended as justifiable; but (ii), as amended, was argued and tested under the yardstick of whether the restrictions gave to the public as building owners "specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them." It failed, and was likewise declared contrary to the public interest.[87]

Whilst acknowledging differences, there are striking similarities with Articles 85 and 86, so that, subject to the application of incompatibility with the common market and effects on trade between Member States the scope for challenge to the use of the standard conditions is wide, both where "concerted practices" not amounting to agreements may be found, and where "abuse" may be found by employers imposing conditions as tender requirements, giving rise to "unfairness" in the wider context of a dominant position and trade between Member States.

The rejected grounds in the *Birmingham* case, of specific and substantial benefits or advantages enjoyed or likely to be enjoyed by the public, are material in contemplating the prospects of an exemption under Article 85(3),

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[85] Section 6 (7) "Where specific recommendations (whether express or implied) are made by or on behalf of a trade association to its members ... as to the action to be taken or not taken by them ... this Act shall apply in relation to the agreement for the constitution of the association ... as if it contained a term by which each such member ... agreed to comply with those recommendations and any subsequent recommendations made to them ... ".

[86] Section 6: "(1) .... applies to any agreement ... being an agreement under which restrictions are accepted ... in respect of the following matters ... (a) the prices to be charged, quoted or paid .... (b) the terms or conditions on or subject to which goods are to be supplied ... (c) the quantities or description of goods to be produced ... (e) the persons or classes of persons to, for or from whom, or the areas or places in or from which, goods are to be supplied ... (3) 'agreement' includes any agreement or arrangement, whether or not it is or is intended to be enforceable ... ; and 'restriction' includes any negative obligation, whether express or implied, and whether absolute or not ...".

[87] Section 21: "(1) ... a restriction accepted in pursuant of any agreement shall be deemed to be contrary to the public interest unless the court is satisfied of any ... of the following circumstances, ... (b) that the removal of the restriction would deny to the public as purchasers, consumers or users ... other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements ... resulting therefrom ...".

with the requirement to show that the agreement or concerted practice "contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives." The perceived foundations for the use and benefits of the principle standard forms in the U.K. were measured and rejected against a yardstick similar in substance to that for exemption, and even the diminished force of the term to press for use of the forms where appropriate did not survive.[88]

It is not far fetched to envisage challenge to the gathering of national bodies of trade and professional associations for the production of standard conditions particularly where the result is adopted in a manner that reflects a concerted practice. Such challenge might come from sources outside the state, and, once raised under Article 85, it may only be a start or even a parallel step to challenge as an abuse under Article 86. There is the potential that national standard conditions or conditions sought to be used by undertakings based on them will be opened to review in the context of abuse and affecting trade between Member States that "may in particular, consist in: directly or indirectly imposing other unfair trading conditions".

[88] The court set out the grounds in these terms: "It is said, and we accept it, that owing to (i) the complexity of most building operations, where hardly any two are alike owing to differences between sites and building owners' requirements, (ii) the complicated relationships arising concerning not only builder and building owner, but also architects, quantity surveyors, and sub-contractors, and (iii) the need for making provision in advance for the almost inevitable changes and variations that take place in the course of construction, special skill and experience are required in drafting building contracts. That skill and experience, representative of the great majority of parties interested, has been brought to bear on the production of the seven standard forms issued with the sanction of the RIBA, since they are the work of the JCT, which is a standing body constantly considering the current forms and from time to time revising them in order to effect improvements and keep abreast of developments. Indeed, new and much redrafted editions of each of the four main contract forms, resulting from several years' work by the JCT, were finally approved by its constitutent bodies during the hearing of the reference and we were told that they would by now be available to the public. The public as building owners benefit, it was said, by the availability of such forms and by their use wherever appropriate because they are fair to all parties and well known to builders. The latter point was said to be of importance in keeping tender prices down, since builders invited to tender on unfamiliar conditions are, as we find, apt to raise their tenders in order to cover unknown contractual contingencies. Similarly, the sue of well-drafted and well-known forms was said to lessen the likelihood of disputes with consequential waste of time and money. Many similar arguments were advanced in relation to the three forms not resulting from the deliberations of the JCT namely, the two sub-contract forms and the conditions of estimate, it being stressed in relation to the two former that it was important, as was admitted by the registrar, that sub-contract forms should be geared into the main contract forms. We were not invited to examine many of the detailed provisions of the 10 forms before us or any of the provisions of the newly drafted forms, but there was a body of evidence called comprising architects, quantity surveyors and builders to the effect that whilst no standard form could be perfect, the forms before us were well drafted and were fair to the parties concerned."

The impact of contract provisions is wider than as between contracting parties,[89] for attempted imposition of conditions reflecting nationally individualistic perceptions and practices could well constitute abuse affecting trade between Member States. The European Parliament's call for the standardisation of contracts and controls in the construction industry and for harmonisation of responsibilities,[90] is on the implicit assumption that this would foster trade between Member States, but even when tested against the EC's perceptions for competition, any set of standard conditions that reflects nationally individualistic perceptions and practices could be seen as abuse detrimental to trade between Member States.[91]

As stated in the Mathurin Report "the free movement of goods and services would be achieved more easily in the field of construction if the Member States of the Community could reach agreement in the context in which operations to take place; on, essential requirements, role of participants, drawings and specifications, contract documents, and responsibilities."[92] Undoubtedly the "co-existence of different systems of responsibility - sectoral regulations, common law, specific law, model contracts" - leads to multiple complications that may deter participation, with disparities and peculiarities constituting a real obstacle to competition. It is again not far fetched to envisage that conditions of contract not unfair between employer and contractor within the national laws of the Member State may be subject to investigation as unfair, as affecting trade between Member States, but, whether or not such investigation will even be called for by the application of Article 86, it is the desire to facilitate greater cross border trade in the construction industry that has led to the consideration of methods of harmonisation of responsibilities.

Whilst a series of goals as to the responsibilities and risks to be superimposed

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[89] In the UK: Unfair Contract Terms Act 1977. In the EEC: Commission of the European Communities. Proposal for a Council Direction unfair terms in Consumer Contracts. 3rd September 1990.

[90] European Parliament. Resolution 12th October 1988.

[91] Standard forms are perhaps the evocation of the worst elements of nationalism amongst legal systems where they do not aspire to principle, but represent the lowest common denominator of national sectional interest. As a means of uniformity in diverse systems they would have to be subjugated to principle, if not devised to represent it.

[92] EC Commission, Mathurin, Final Report, 2nd February 1990, p. 2-3.

on nationally favoured contracts would not meet the full vision of harmony, or overcome differences in practice, the growth of subsidiarity as a principle may render the identification and implementation of such goals the acceptable limit of it. The idea of a European standard form of construction contract, however, would encapsulate those responsibilities and provide a vehicle for harmonisation.[93]

3 A Standard standard-form?

The EC Discussion Paper asks again whether a Standard Community Contract should be created, contemplating that the parties would be free to choose it, and that national laws would remain unaltered. It identifies three questions: how can genuine freedom of choice be ensured if the parties' economic weight is not the same; would the choice result in national rules being waived, and if so, how; and, should such a standard contract apply to construction works as a whole or could it only cover one or more participants?

Economic weight of parties' will always be a factor affecting contract terms, and the choice raised will take place in the market place.[94] Whether the choice is made to use the standard contract will depend on the risks and responsibilities to which it would give rise as against other available options, and that will depend on the effects of national legal systems in respect of the chosen terms.[95] The distinction for the application of the standard contract, between construction works as a whole and limited participants, indicates that the question is directed more towards those to be within a code of responsibilities than terms governing the actual design and execution of a building project, because of the range and number of participants.

The idea that harmonisation might be achieved by the adoption of standard and uniform contract documentation mooted in the Mathurin Report was

[93] Professor C.M. Schmitthoff, The Unification and Harmonisation of Law by means of Standard Contracts and General Conditions. (1978) 17 I.C.L.Q. 551.

[94] W.D.Slawson, Standard Form Contracts and Democratic Control of Law-Making. (1971) 84 Harv. L.Rev. 529.

[95] Resistance may involve conflicts over accepted terms, The Battle of the Forms: Standard Form Contracts in Comparative Perspective. (1985) 34 I.C.L.Q. 297

not favourably received, and not advanced.[96] Proposers acknowledge that there would be a need for the provisions of such a contract to have the same meaning in whatever part of the Community they are applied or enforced so necessitating the adoption of precise and contemplate lengthy definitions of those terms if necessary.[97] Undoubtedly that mechanism would require implementation by legislation, in the sense that Community regulations and directions would be necessary, and to give it statutory force, however that assumes a degree of harmony and unity of principle to exist at the outset into which agreed terms can be received to achieve a uniform effect throughout the Community.

There is however in existence already a unifying influence of the Commission towards this end, and standard general conditions of contract have been adopted by the Council of Ministers, although they were prepared for use outside the Single Market.[98] The use of the terms is mandatory through the funding of construction projects by the European Development Fund (EDF) in overseas countries.[99] The first version was produced in the early 1970's, and it took many years for agreement to be concluded on the new versions. These include Regulations, covering eligibility and tendering, General Conditions for application to works, supply and service contracts, and Procedural Rules for Conciliation and Arbitration.

Both the background to and the results of this long period of discussion reflect features of different approaches currently debated on proposals for harmonisation within the Community. The former EDF Conditions derived from French initiative, related to countries whose legal systems were mostly based on the French model, and not unnaturally followed the French CCAG terms for public works contracts. The number of acceding States grew to

[96] A standard form was not within the list of measures that the EC Commission recommended in its response to the Mathurin Report, Commission Working Document 111/3750/90 - EN, Rev. 1, July 1990.

[97] J. Uff and N. Jefford, Harmonisation within the European Community in the field of Construction and its effects on Liability and Disputes, in Legal Obligations in Construction. (1992).

[98] In March 1990 the Council of Ministers adopted a new set of conditions for projects in African, Caribbean and Pacific States. This ACP form is found at O.J. L382, 31st December 1990. In December 1991 the Council adopted a similar set for projects in Overseas Countries and Territories, and this OCT form is at O.J. L40, 15th February 1992.

[99] The EDF was created in 1958. It provides funds for developments in Third World countries that are historically linked with Europe. The EDF Conditions of Contract were introduced through the Lomé Convention, first signed in February 1975. The fourth, and currently governing, Lomé Convention was signed inDecember 1989.

include a good proportion whose systems derived from common law, where the FIDIC forms were used in preference to the then non-mandatory EDF Conditions. The desire though was to have the same standard form, and this was achieved through negotiating committees.[100]

The Conditions reflect a compromise, and whilst the FIDIC 4th edition may have formed the base, those elements that discouraged its use in countries whose systems derived from the Code Civil have been overcome, particularly the dislike of the quasi-arbitral role of the engineer. The former EDF Conditions had no provision for appointment of someone to direct performance, so leaving the responsibility for all matters, including dealing with variations, ascertaining payments and confirming provisional and final acceptance, with the employing body.[101] The increased complexity of projects has rendered necessary such a person, and the EDF Conditions now require an official and supervisor responsible for such tasks, but after consultation with both the contractor and employer.

The former provision that the contractor might "avail himself of facts alleged against the Administration and which would involve him in delay and/or detriment in order to obtain, where appropriate an extension of the periods of performance, the revision or rescission of the contract and/or damages" might have been understood in conjunction with code provisions, but the basis for claims is now spelt out and they involve the supervisor's decision, albeit after consultation. The ability to order variations is "for the proper completion and/or functioning of the works",[102] and the scheme for termination is specified, with both areas identifiable from FIDIC.

From this detailed and negotiated compromise between the civil and common law approaches, emerges a form which would inevitably be a starting point for any standard conditions within the Community. The position of the supervisor carries the responsibility for deciding such matters as the value of variations, additional payments and extensions of time, and

[100] The European International Contractors Group also assisted with representation.

[101] The former EDF Conditions in fact were published in English. Commentary on comparisons was given by N. Gould, European Standard General Conditions of Contract? IBA Conference Paper, September 1992.

[102] EDF Conditions, 1992, Article 37.

while he must consult with employer and contractor, the quasi-arbitral status is not present. While his decisions will be subject to challenge in arbitration, they are acts of the employer, and the compromise places the supervisor closer to the position of the *maitre d'oeuvre* as seen in French practice than to the engineer under FIDIC. This appears a viable way forward on the basis that employers should be able to have their consultants as their true advisers throughout the project, and the historically derived dual role of the professional, which carries its own difficulties, ought not to prevail. Deriving from this lesser impact of the supervisor's role is the corollary of a greater involvement by the contractor in drawing up the detailed programme for approval, which reflects procedures seen in the AFNOR conditions.

The power of the principle of *réception* is shown in that the EDF Conditions have not imported the concept of substantial completion as it appears in FIDIC, although, interestingly, provisional and final acceptance are utilised for the purposes of maintenance obligations, but not to permit the taking over and use of the works before completion.[103] The supervisor's action is limited to verification of the works with a view to such provisional and final acceptance. There is no blurring of the time of completion, in the sense of practical completion or when certified, and liquidated damages are payable for delay to the date of actual completion.[104]

While the EDF Conditions utilise similar circumstances from FIDIC for extensions of time and additional payments,[105] and *force majeure* is a ground for extension, this concept is deployed separately and additionally in its civil law role, so that "Neither party shall be considered to be in default or in breach of his obligations under the contract if the performance of such obligations is prevented by any circumstances of *force majeure* ". To the extent that the contractor's delay in performance or other failure to perform is the result of an event of *force majeure* he is exempted from liability under the performance guarantee, liquidated damages and termination for default.[106] Further, the approach towards subcontractors bears the imprint of

[103] EDF, 1992, Articles 57 to 62.

[104] EDF, 1992, Article 36.1.

[105] EDF, 1992, Article 21 utilises he phrase "artificial obstructions or physical conditions".

[106] EDF, 1992, Article 66.

the French legislation of 1975 relating to direct payments, and no distinction is drawn between domestic or nominated subcontractors. The retention is expressed as by way of guarantee to meet the obligations during the maintenance period, and again the French influence of the permissible retention guarantee instead is present.[107]

The consensus to bring about the new EDF Conditions is without doubt a major achievement, but a similar consensus for a form within the construction industries of the Community is less certain, while the imposition of a form as the means to achieve harmonisation is even less certain.[108] Such a form though would lay out the ground and undoubtedly assist understanding and so widen the scope for competition in that way. It could be introduced into public works contracts in the context of public procurement, if at first on a voluntary basis. Although the diversity of practices to be addressed extends further than the terms and mechanics of a contract document, the advance of Community legislation controlling procurement shows that this is no bar to the implementation of certain general requirements.[109]

4 Ways Forward?

Even if the will was present in order to advance the goal of competition, the imposition of uniform contract terms might be the antithesis of the essential freedoms within which the aspirations for a common market and trade between Member States are to exist. Standard words do not produce standard results. Standard words of description as to meanings of words are equally unlikely to produce standard results.

A vision of harmonisation requires more than standardisation of terms, which upon different applications would prove counter-productive. The

[107] EDF, 1992, Article 47.

[108] The Institution of Civil Engineers advanced its "New Engineering Contract" in a consultative edition in 1991, and following consultation the first edition was published in 1993; M. Barnes (1991) 8 I.C.L.R. 247 and (1993) 10 I.C.L.R. 228.

[109] Professor S. Arrowsmith, An Overview of EC Policy on Public Procurement: Current Position and Futurre Prospects. (1992) 1 Publ. Proc. L.R. 29; although problems are inevitable, A.Cox, Implementing 1992 Public Procurement Policy: Public and Private Obstacles to the Creation of the Single European market. (1992) 1 Publ. Proc. L.R. 139.

aspiration of standardisation may more easily be achieved by adopting a series of goals as to the responsibilities and risks to be undertaken by the contracting parties. These would then in time represent the norms associated with building contracts, and become superimposed to the end that provisions would be interpreted and applied so as to fall within and meet those goals. In this way a common law of European dimension would begin its evolution, drawing on the principles and mechanisms embodied in the history and approach of participating nations. But is this forelorn hope?

If standard results from terms are the goal in respect of the construction process then true harmonisation first requires analysis of the ends and aims of the laws of the nations that make up the EEC, and the distillation of principles, to arrive in the first instance at a code of responsibilities attaching to those who take on functions in relation to building work. Then, with experience, restriction on exclusion or modification can develop, with implementation by Community regulation and through national legislation as widely or narrowly as Community consensus requires or permits.

In this way responsibilities and rights of the parties involved in the construction process move towards harmony, apparent and actual disparity between national laws and practices recede, and national peculiarities in the organisation and methods of the construction industries are not required to be subjected to minute examination as part of the process. A regime may thus be established under which decisions of national courts, reflecting the inevitable multitude of fact situations, are taken with reference to, and for the benefit of, an increasing body of decisions across Europe applying the provisions of such a code. Guidance from the decisions of the European Court of Justice will aid understanding and promote harmonisation.[110]

The receipt of Community-led legislation is no longer unknown in the UK and familiar elements of legislation are inevitably likely to be further affected by Community regulation in substantial ways.[111] The organisation and methods of the construction industries in the individual nations as reflected

[110] G. Slynn, Introducing a Eurpean Legal Order. (1992) The Hamlyn Lectures.

[111] The Unfair Contract Terms Act 1976, and unfair terms in consumer contracts, as now derived from the recent EC Directive which has rseulted from the proposal of September 1990.

in methods of procurement and standard conditions are open to challenge under existing Community legislation,[112] and this will continue not just by additional regulation, but by greater awareness of the ability to challenge procurement and contractual practices in national courts.[113] The impact of Articles 85 and 86 on standard conditions is a potential area, and the burgeoning of detailed Community regulation is likely to widen the scope for consideration of unfairness within Article 86.[114]

The reception of a code of responsibilities or liabilities into English law is far from difficult, as perceived by the view of English law set out in Mathurin. A limited code already exists in the Defective Premises Act 1972. It is limited by its reference to dwellings but, as appreciated by Mathurin, it provides an important basis for liability by way of statutory duties that cannot be excluded or restricted by contract. Undoubtedly the traditions of practitioners give priority to allegations in relation to terms of contracts, express or implied, and their breach, yet, in principle, the 1972 Act imposes a code that effectively renders reference to contract terms supplementary, or even unnecessary, in pursuit of damages, and the like effect would gradually emanate from a code with a wider jurisdiction than dwellings.[115]

The attitudes disclosed following the publication of the Mathurin report included a feeling of concern that harmonisation would bring about the loss of the common law impact in the field of construction contracts, which has hitherto been substantial. Particularly, FIDIC was concerned at a move away from the common law system, on which its forms of conditions of contract are based, towards the civil law system.[116] The fear is not justifiable, for England has capacity to offer and to influence as well as receive, as the

[112] In both national courts, General Building & Maintenance Ltd. v Greenwich London Borough Council (1993) The Times 9th March 1993, and in the European Court of Justice, The Commission of the European Communities v Ireland [No. 45/87] (1988) E.C.R. 4929, 44 B.L.R.1 (the Dundalk case).

[113] M. Bowsher, Prospects for Establishing an Effective Tender Challenge Régime: Enforcing Rights under EC Procurement Law in English Courts. (1994) 1 Publ. Proc. L.R. 30.

[114] L. Ainsworth, Competition Law Enforcement in Construction; and M. Bowsher, Competition Law within the EEC and its effect on Construction, in Legal Obligatios In Construction, Uff & Lavers (eds.).

[115] The vehicle exists in the shape of section 38 of the Building Act 1984, and the power to make regulations under it.

[116] FIDIC conference work-shop, Tokyo, September 1991. Report (1992) 9 I.C.L.R. 68. The fear was expressed as "allayed", particularly as the ministerial representatives of the member states in a meeting of the GRIM, [Groupe Réglementation, Information Management] had decided on 25th October 1990 that the totality of his proposals were unnecessary since the areas recommended for harmonisation did not in their opinion form barriers to trade.

example of the new EDF Conditions shows in drawing on a common law understanding. Nor should the door be closed to the opportunity to test one's system and concepts in a wider context.

Equally important is that there can be no general assumption that the civil law countries are at one,[117] and that it is only the common law that is the odd man out. This may be so in terms of background, but is not so in ultimate goals. Within the civil law countries a different legal policy towards the same derived rule is likely to pose problems greater than those that may follow from the need to first identify the effective rule under the common law.[118] An English attitude that somehow common law is external to Europe, and needs protection from it, must be overcome.

The feature in respect of construction that appears divisive between England and the civil law in France is in the background to responsibility. To be forced to put one's hand on it identifies that background as the influence of the separateness of the role of the engineer or architect, and through that historically embedded role the influence on and of standard conditions.[119] Separateness, whereby the existence of responsibility to the building owner for the success of the project requires a contractual search, is often diffuse in nature. This is distinct from the responsibility assumed from the fact of involvement in the project and the guarantee obligation attaching to that, derived from a responsibility of status and developed through the legislative changes in France. Separateness is reflected also in the mechanisms of the construction contract in England and the superimposition of an independent role attributed to the professional who is in fact engaged by the employer. This again dissipates clarity of responsibility, and there is no fundamental difficulty in removing the function of decider or resolver from those to whom responsibility may be attributed.

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[117] A. Shalakani, The Application of the FIDIC Civil Engineering Conditions in a Civil Code System. (1989) 6 I.C.L.R., 226.

[118] For example the same original decennial liability was contained in Article 1645 of the former Netherlands Civil Code as in Article 1792 of the Belgian Code. Whereas in Belgium the liability is treated as one of public policy from which there can be no exclusion, both the level and duration of such liability could be validly limited by architects, engineers and contractors through their conditions of contract.

[119] Brabant, Les Marchés Publics et Privés dans la C.E.E. et Outre-Mer, Vol. 1 p. 118 and 248f., and F. Einbinder, The Role of an Intermediary between Contractor and Owner an International Projects: A French Contractor's Viewpoint. IBA Conference Paper, September 1992.

The disparity of national systems of construction should not override the ability to achieve a uniform code of responsibilities if this is to be the aim, nor should the disparity of national systems of law. The process for and achievement of the Uniform Law on the International Sale of Goods may show the way. The Hague conference of 1964 was a significant undertaking,[120] and whilst determining principles on which the uniform law should be based,[121] it also laid the path for development and wider application.[122] This was and is unification involving States of the civil law system and the common law family, overcoming the conceptual distances dividing the two as well as differences within the civil law systems.[123] The accepted solution in many cases was the common law rule, and the dangers of the use of words denoting different concepts in different systems were avoided.[124]

The adopted drafting intent, which could well be a model for a code applicable to construction responsibilities, was not to bring about compromise, but aimed at setting in a clear understandable language, the important principles which could be considered as practicable and reasonable, proper to indicate the future direction of the law.[125] However the production of a code of responsibilities should not be an end in itself, it has to have scope for evolution.

That the area of construction was selected by the European Parliament for the advancement of harmonisation is understandable because of the substantial interest in health and safety, and consumer protection, within it. Beyond this the goal to be achieved remains uncertain as reflected in the retreat from the wide scope of the Mathurin Report, and the questions in the EC Discussion

[120] It was commenced more than thirty years earlier by the International Institution for the Unification of Private Law [the Unidroit or Rome Institute], and resumed in 1951. The 1951 resumption was recognised as important by the Benelux States "as the existing legal differences were prejudicing the functioning of the common market." Professor O. Riese, International Problems in the Law of Sale: Some Comparative Aspects of the Law Relating to the Sale of Goods. (1964) I.C.L.Q. Suppl. Publ. 9, 35.

[121] It also appointed a special commission to draft the text.

[122] Revision took place at an open forum In the Hague, in 1985, with participation from a far wider group of nations than those involved in 1964.

[123] Discussed in A. Szakats, The Influence of Common Law Principles on the Uniform Law on the International Sale of Goods. (1966) 15 I.C.L.Q. 749.

[124] For example the word "warranty".

[125] Professor Riese, op. cit.. The areas addressed covered many from which those concerned with harmonisation of responsibilities for construction could draw guidance, such as hidden defects, the relationship between the action for reduction of price and damages, and specific performance.

Paper of June 1993, which, although deriving from the specific pointers of GAIPEC, are really addressing the fundamental point of what needs to be done and why. Construction contracts are but one application of private law, and its selection raises the problem of how far the process is to be taken and of the ability to consider it as a discrete subject.

A warning of Sir Otto Kahn-Freund was that:

> "[t]he selection of areas of law to be harmonised must be dictated by practical requirements and by nothing else. The harmonisation of fundamental principles of private law, of the general principles of the law of contract, tort or property, of family law or of the criminal law does not belong to these requirements. It is not needed for a functioning and successful economic community. It would not even be a requirement for a political community, not even for a very close federation."

and he concluded the point by saying:

> " To labour this point is quite unnecessary, but I desired at the outset to register my conviction that to harmonise entire legal systems is, from the point of view of the political, economic and cultural future of Europe, a work of supererogation, and, moreover, the work perhaps more of a Sisyphus than of a Hercules."[126]

The Resolution passed by the European Parliament in 1989 "on action to bring into line the private law of the Member States",[127] requested "that a start be made on the necessary preparatory work on drawing up a common European Code of Private Law." Individual aspects of private law had been addressed but to meet the needs and objectives of the single market without frontiers more was needed than the mere coverage of individual subjects. What was seen as needed was the unification of major branches of the law and the creation of "a modernised common system of private law." The Resolution therefore requested that the Member States be invited to state whether they wish to be involved in this enterprise, and that committees of experts be set up to define the priorities and organise the whole undertaking of unifying the private law of those States. The scope of the Mathurin Report would have been a very good reason for not approaching the construction

[126] From a speech by Sir Otto Kahn-Freund to a Conference on "New Perspectives for a Common Law of Europe", Florence, 1978. Kahn-Freund, Common Law and Civil Law - Imaginary and Real Obstacles to Assimilation, in, New Perspectives for a Common Law of Europe (ed. Cappelletti 1978) 137.

[127] O. J. EC 1989 C 158/400 (26th June 1989).

industry in isolation from a wider view of private law.

There is no doubt that progress has been made through Community legislation, and that unification or harmonisation of law in the traditional legislative sense will be needed for quite some time. However, unification of law is not costless and its cost may in some cases outweigh its benefits. The tendency has been towards specific areas and particular topics, and considerable problems arise from treating this as the only method of unifying or harmonising the law One problem is that in this increasingly complicated patchwork the unified rules will often overlap, and clash with the non-unified rules of national law. The fragmentary character of unified law creates additional complexity of the legal system. Further, unification of the law relating to construction contracts cannot be approached without considering general concepts of contract and tort. These basic concepts may well take the same verbal forms in different legal systems, and it is tempting to adopt them in uniform rules without more, but if this is done then, when the national courts actually have to apply them, it will be discovered where beneath the same words lie dissimilar concepts.

Another cost of the unification of law through codification may be the tendency to petrify the law by restricting the individual States' competence to adapt it to changing social or economic conditions. By participating in unification a State normally gives up its freedom to revise the uniform law in the light of later developments, and amending a uniform law is a cumbersome process requiring the co-operation and agreement of other States. For these reasons, unification of law through codification significantly reduces a state's power to react to social and economic change, and so tends to restrain competition among legal systems for the best solution of a given problem.

Unification of law in the traditional legislative sense will however be implemented in Europe for the foreseeable future, and this should be accompanied by a corresponding movement in legal study. The movement should aim at the identification and learning of legal principles which the European nations have in common, a form of European common law. The

legal historian, Professor Coing, pointed out that the adoption of uniform statutes is not the only way to legal uniformity and that it may also be achieved through a uniform learning based on a uniform common stock of legal ideas, principles and rules. The significance of this for the future may lie, suitably adapted, in:

> "the immense role academic learning has had in the formation of our common legal heritage, in the Middle Ages as well as in the Age of Enlightenment ... We must revise the idea which dominated ... in the 19th century, that national [law] must be the basis of legal training ... what we must aim for is ... to present the national law in the context of those legal ideas which are present in the [law] of different nations, that is, against the background of the principles and institutions which the European nations have in common."[128]

What is likely to be useful is discussion of legal principles from a non-national comparative viewpoint, to see the extent to which there exists in the particular field a common stock of principle and rules used throughout the laws of the European nations, in other words, a European common law.[129] There is not however a legal literature tackling the task of developing principle in a European common law, certainly in the field of building contracts. This thesis is but one student's attempt at a view that could be multiplied and expanded.

Despite their common tradition, the European legal systems have charted individual courses for years. They have sat in their niches, walled off from each other by the boundaries of the nation and by the barriers of politics, economics and language.[130] Against this, they have all been exposed to similar social and economic forces, to the consumer protection movement, to the need to protect the environment, and more. The common stock of European legal principles and rules may lie hidden, yet the working

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[128] Coing, European Common Law: Historical Foundations, in: New Perspectives for a Common Law of Europe (ed. Cappelletti 1978) 31-44, at 44. His main example was the *ius commune* as it was developed in Continental Europe on the basis of Roman-Canon law. This *ius commune* was applied by the courts as a merely subsidiary source of law, in the sense that it was followed only where no local or national rules existed. When there was a gap in the local or national rules or when they were ambiguous they were interpreted in the light of the *ius commune*.

[129] Advocated by Professor H. Kotz in his Paper,, European Common Law as an Academic Subject. Conference of the Society of Public Teachers of Law. (1992).

[130] The view of Professor Kotz is attacked by Professors Friedman and Taubner, Legal Education and Legal Integration, in Integration Through Law, edited by Cappelletti, Secombe and Weiler, Book 3, Forms and Potential for a European Identity, 345. They assert that the search for common ground in European legal systems is a doomed hopeless hunt for lost doctrines. But surely the search is not for the lost?

hypothesis should be that it is there, waiting to be brought to light by an effort on the part of comparative lawyers. This is the observation that, despite the differences in their historical development, conceptual structure and style of operation, different legal systems often give the same or very similar solutions to the same problems. Under similar pressures in similar societies the law is apt to change in the same direction, even though the legal techniques used to achieve that change may differ. The means of change of a legal system are determined by legal tradition, and this suggests that the search for common cores should be guided by the basic principle of the function. *Réception* and substantial completion is just one example.

The conceptual contexts and national doctrinal overtones are important for understanding, and while solutions attempting to satisfy a particular need do not depend on the headnotes of judicial opinions, but on what is actually being done, both need to be viewed, although not necessarily in the compartments constructed in national legal systems in order to make the law orderly and findable.

The Commission of European Contract Law is publishing general principles of the law relating to the performance and non-performance of contracts, and UNIDROIT is working on principles for international commercial contracts. If these initiatives simply mark out areas of agreement and disagreement, and assist in constructing a European legal understanding of concepts large enough to be functionally comparable, they will contribute to a thinking that is perhaps more central to the idea of a common law and of greater necessity for consideration in the construction industries than that of identity of mechanism.

Channel Tunnel Group Ltd. and Others v Balfour Beatty Construction Ltd and Others (1992) 2 Q B. 656 (C.A.), (1993) A.C. 334 (H.L).
Chaplin v Hicks (1911) 2 K.B. 796 (C.A.).
Chester Grosvenor Hotel Co. Ltd. v Alfred McAlpine Management Ltd. (1992) C.I.L.L. 740.
Chillingworth v Esche (1924) 1 Ch. 97.
City of London v Nash (1747) 3 Atk. 512.
Clark v. Bulmer (1843) 11 M. & W. 243.
Clay v Crump (1964) 1 Q.B. 533.
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